Public Prosecutor v Tan Sri Kasitah Gaddam

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO J1–46–6 OF 2004
SURAYA OTHMAN J
12 AUGUST 2009

Criminal Law — Cheating — Charge — Essential ingredients of offence — Whether chairman of Sabah Land Development Board deceived board members into approving sale of shares in which he had interest — Whether there was dishonest concealment of information — Penal Code s 417

Criminal Law — Emergency (Essential Powers) Ordinance No 22 of 1970 — s 2(1) & (2) — Corrupt practice — Whether essential elements proved by prosecution

Criminal Procedure — Prosecution — Prima facie case — Close of prosecution's case — Maximum evaluation of evidence — Whether each and every essential ingredients of offence must be proven by credible and reliable evidence — Whether inference most favourable to accused to be drawn if there were material gaps in evidence

Emergency Legislation — Corruption — Corrupt practice — Corrupt practice by chairman of Sabah Land Development Board — Taking part in decisions of board of directors to approve sale of shares in which he had interest — Essential ingredients of offence — Whether prima facie case made out — Whether accused used his position as chairman to influence board members — Whether prosecution failed to prove element of inducement — Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)

The accused was charged with two charges, one under the Emergency (Essential Powers) Ordinance No 22 of 1970 ('Ordinance 22') and another under s 417 of the Penal Code. The first charge was a conflict of interest charge and the second was for cheating. Both charges emanated from a meeting held by the Sabah Land Development Board ('SLDB') on 22 October 1996 at a meeting room in Fairlane Hotel, Kuala Lumpur. It was alleged that the accused had committed corrupt practice by using his position as chairman of SLDB for his financial advantage in that he did take part in making the decision to approve the proposed sale of 16.8 million shares

owned by SLDB in SAPI Plantations Sdn Bhd ('SAPI') to Briskmark Enterprise Sdn Bhd ('Briskmark') wherein the accused was promised 3.36 million of the shares in SAPI by one Datuk Wasli bin Mohd Said. The essence of the second charge was that the accused deceived the members of the board of SLDB by dishonestly concealing to them the offer made by PPB Sdn Bhd ('PPB') of which he had knowledge of on 13 September 1996, to allot five PPB Oil Palms Sdn Bhd ('PPBOP') shares to every one SAPI share in its proposal to be listed in the Main Board of KLSE and by this concealment the accused intentionally induced the members of SLDB to approve the sale of 16.8 million shares of SAPI owned by SLDB to Briskmark which they would not have approved had they known of the PPB's offer.

Held, acquitting and discharging the accused:

(1) In order to prove the first charge against the accused, the prosecution had to establish three essential ingredients, that is: (a) that he was a public officer at the material time ('chairman of SLDB') and that while being such public officer ('chairman') he committed a corrupt practice; (b) the accused used his position (as chairman of SLDB) for pecuniary advantage (conflict of interest) by taking part in making the decision on 22 October 1996 in approving the proposed sale of 16.8 million shares of SAPI owned by SLDB to Briskmark; and (c) the conflict that he put himself in was with respect to being promised 3.36 million of SAPI shares by Datuk Wasli bin Mohd Said (see para 20).

(2) The essential ingredients to prove the second charge were that: (a) the accused during the SLDB board of directors ('BODs') meeting on 22 October 1996 deceived the members of the board by dishonestly concealing PPB's offer of five PPBOP shares for every one SAPI share which offer he knew on 13 September 1996; (b) by concealing the PPB's offer, the accused intentionally induced the members of the board to approve the sale of SAPI shares owned by SLDB to Briskmark; (c) the members of the board would not have approved the sale of 16.8 million SAPI shares to Briskmark had they been aware of PPB's offer; and (d) the act of the accused caused damage to SLDB (see para 25).

(3) A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. A maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence. A maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and

reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence then the inference that is most favourable to the accused shall be drawn (see paras 35–36).

(4) Based on the evidence, the prosecution had failed to make out a prima facie case against the accused in respect of the first charge. The prosecution had not proved that the accused had used his position as chairman to influence the members of the board. The BODs of SLDB made their decision to approve the sale of SAPI shares to Briskmark collectively 'sebulat suara' due to the many favourable factors accompanying the Briskmark proposal. The prosecution failed to prove the element of inducement on the part of the accused which inducement led to the board members approving the sale of SAPI shares to Briskmark (see paras 154 & 207).

(5) The prosecution had failed to prove all the elements of cheating on the second charge and therefore failed to make out a prima facie case against the accused (see para 215).

[Bahasa Malaysia summary

Tertuduh dituduh dengan dua tuduhan, satu di bawah Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 1970 ('Ordinan 22') dan satu lagi di bawah s 417 Kanun Keseksaan. Tuduhan pertama merupakan tuduhan konflik kepentingan dan yang keduanya kerana menipu. Kedua-dua tuduhan bermula daripada mesyuarat yang diadakan oleh Lembaga Pembangunan Tanah Sabah ('LPTS') pada 22 Oktober 1996 di bilik mesyuarat di Hotel Fairlane, Kuala Lumpur. Dihujahkan bahawa tertuduh telah menerima rasuah dengan menggunakan jawatannya sebagai pengerusi LPTS untuk faedah kewangannya apabila dia mengambil bahagian dalam membuat keputusan untuk meluluskan penjualan 16.8 juta saham-saham yang dimiliki oleh LPTS dalam SAPI Plantations Sdn Bhd ('SAPI') kepada Briskmark Enterprise Sdn Bhd ('Briskmark') yang mana tertuduh dijanjikan 3.36 juta saham dalam SAPI oleh Datuk Wasli bin Mohd Said. Intipati tuduhan kedua ialah bahawa tertuduh dengan curang menipu ahli-ahli lembaga LPTS dengan menyembunyikan tawaran yang dibuat oleh PPB Sdn Bhd ('PPB') yang diketahuinya pada 13 September 1996, untuk mengagih-agihkan lima saham PPB Oil Palms Sdn Bhd ('PPBOP') kepada setiap satu saham SAPI dalam tawarannya untuk disenaraikan dalam Papan Utama KLSE dan dengan menyembunyikannya, tertuduh berniat untuk memujuk ahli-ahli LPTS untuk meluluskan penjualan 16.8 juta saham SAPI yang dimiliki LPTS kepada Briskmark, yang sudah pasti tidak akan diluluskan oleh mereka sekiranya mereka mengetahui tawaran PPB tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Bagi membuktikan tuduhan pertama terhadap tertuduh, pihak pendakwaan perlu membuktikan tiga unsur utama, iaitu: (a) bahawa dia merupakan pegawai awam pada masa material (pengerusi LPTS) dan bahawa semasa dia menjadi pegawai awam (pengerusi) dia telah menerima rasuah; (b) tertuduh menggunakan jawatannya (sebagai pengerusi LPTS) untuk faedah kewangan (konflik kepentingan) dengan mengambil bahagian dalam membuat keputusan pada 22 Oktober 1996 bagi meluluskan cadangan penjualan 16.8 juta saham yang dimiliki oleh PLTS kepada Briskmark; dan (c) dia telah meletakkan dirinya dalam konflik berkenaan 3.36 juta saham SAPI oleh Datuk Wasli bin Mohd Said (lihat perenggan 20).

(2) Intipati utama untuk membuktikan tuduhan kedua ialah: (a) semasa mesyuarat lembaga pengarah ('LP') LPTS pada 22 Oktober 1996 tertuduh telah menipu ahli-ahli lembaga dengan curang menyembunyikan tawaran PPB untuk lima saham PPBOP untuk setiap satu saham SAPI yang diketahuinya pada 13 September 1996; (b) dengan menyembunyikan tawaran PPB, tertuduh bertujuan memujuk ahli-ahli lembaga untuk meluluskan saham SAPI yang dimiliki oleh LPTS kepada Briskmark; (c) ahli-ahli lembaga tidak akan meluluskan penjualan 16.8 juta saham SAPI kepada Briskmark sekiranya mereka mengetahui mengenai tawaran PPB; dan (d) tindakan tertuduh menyebabkan kerugian kepada LPTS (lihat perenggan 25).

(3) Kes prima facie timbul apabila keterangan memihak satu pihak adalah cukup kuat untuk pihak lawan dipanggil untuk membela diri. Penilaian maksima terhadap kredibiliti setiap saksi pihak pendakwaan perlu dilakukan pada penutup kes pihak pendakwaan sebelum mahkamah boleh memutuskan bahawa kes prima facie telah dibuktikan untuk memanggil membela diri. Penilaian maksima kes pendakwaan tidak bermaksud bahawa pihak pendakwaan perlu membuktikan kesnya tanpa keraguan yang munasabah pada peringkat tersebut. Apa yang dimaksudkan ialah pihak pendakwaan perlu membuktikan setiap dan kesemua intipati kesalahan melalui keterangan boleh dipercayai yang telah ditapis dan melalui proses penilaian yang positif. Keterangan mestilah tidak mempunyai sebarang jurang material barulah inferens yang memihak kepada tertuduh akan diputuskan (lihat perenggan 35–36).

(4) Berdasarkan keterangan, pihak pendakwaan telah gagal membuktikan kes prima facie terhadap tertuduh berkenaan tuduhan pertama. Pihak pendakwaan tidak membuktikan bahawa tertuduh telah menggunakan jawatannya sebagai pengerusi untuk mempengaruhi ahli-ahli lembaga. Ahli-ahli lembaga pengarah LPTS telah membuat keputusan untuk meluluskan penjualan saham SAPI kepada Briskmark secara kolektif

'sebulat suara' berikutan faktor-faktor yang banyak memihak cadangan Briskmark. Pihak pendakwaan gagal untuk membuktikan elemen dorongan bagi pihak tertuduh yang mana dorongan tersebut membuatkan ahli-ahli lembaga meluluskan penjualan saham SAPI kepada Briskmark (lihat perenggan 154 & 207).

(5) Pihak pendakwaan telah gagal membuktikan kesemua elemen penipuan pada tuduhan kedua dan oleh itu kes prima facie telah gagal dibuktikan terhadap tertuduh (lihat perenggan 215).]

Notes

For cases on corrupt practice, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2117–2122.
For cases on enforcement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1678–1684.
For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.
For cases on s 2(1), (2) of the Emergency (Essential Powers) Ordinance No 22 of 1970, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 631–637.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230, FC (refd)
Khoo Kay Jin v PP [1964] MLJ 22, HC (refd)
Lau Song Seng & Ors v PP [1998] 1 SLR 663, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor [1997] 1 MLJ 562, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Baldev Singh Gurcharan Singh [1997] 1 CLJ 488, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Datuk Hj Harun bin Hj Idris (No 2) [1977] 1 MLJ 15, HC (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166, FC (refd)
PP v Datuk Tan Cheng Swee [1979] 1 MLJ 166, FC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 180(1), 418A(1)
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1), (2)
Evidence Act 1950 s 114(g)
Interpretation Acts 1948 and 1967 s 3
Penal Code ss 415, 415 Explanation 1, 417

Sabah Land Development Board Enactment 1981 ss 3(1), 4(2), 25, 26, Part V

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Suraya Othman J:

INTRODUCTION

[1] The accused is charged with two charges, one under the Emergency (Essential Powers) Ordinance No 22 of 1970 ('Ordinance 22') and another under s 417 of the Penal Code (FMS Cap 45). The first charge generally being a conflict of interest charge and the second being for cheating. Both charges emanated from one meeting held by the Sabah Land Development Board ('SLDB') on 22 October 1996 at a meeting room in Fairlane Hotel, Kuala Lumpur.

[2] The accused was brought before the sessions court on 12 February 2004 and the case was transferred to the High Court upon a certificate of the public prosecutor under s 418A(1) of the Criminal Procedure Code (FMS Cap 6). The trial commenced on 8 January 2007 and after a protracted trial, the prosecution closed its case on 10 February 2009. Submissions were fixed for April 27 to 29 and 12 to 15 May 2009. In the course of the trial the prosecution called 31 witnesses and 337 exhibits were tendered.

THE CHARGES

[3] *The first charge* (amended) against the accused (P3) reads:

> Bahawa kamu pada 22hb Oktober 1996 di Bilik Mesyuarat Forum, Fairlane Hotel, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang penjawat awam, iaitu Pengerusi Lembaga Kemajuan Tanah Negeri Sabah (LKTNS), telah melakukan perbuatan rasuah dengan menggunakan kedudukan kamu sebagai Pengerusi LKTNS untuk faedah kewangan kamu, iaitu kamu telah mengambil bahagian dalam membuat keputusan meluluskan cadangan penjualan 16.8 juta saham LKTNS di dalam SAPI Plantations Sdn Bhd kepada Briskmark Enterprise Sdn Bhd yang mana kamu telah dijanjikan oleh Datuk Wasli bin Mohd Said sejumlah 3.36 juta saham dalam SAPI Plantations Sdn Bhd tersebut; dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 2(1) Ordinan No. 22 (Kuasa-Kuasa Perlu) Dharurat Tahun 1970.

[4] In essence, the charge preferred against the accused under Ordinance 22 is that at the meeting room of Fairlane Hotel ('the hotel'), as chairman of the SLDB, and as a public officer he committed corrupt practice by using his position as chairman of SLDB for his financial advantage in that he did take part in making the decision to approve the proposed sale of 16.8 million shares owned by SLDB in SAPI Plantations Sdn Bhd ('SAPI') to Briskmark Enterprise Sdn Bhd ('Briskmark') wherein the accused was promised 3.36 million of the shares in SAPI by Datuk Wasli bin Mohd Said.

[5] *The second charge* (amended) against the accused (P4) reads:

> Bahawa kamu pada 22hb Oktober 1996 di Bilik Mesyuarat Forum, Fairlane Hotel, di dalam Wilayah Persekutuan Kuala Lumpur, telah menipu ahli-ahli mesyuarat Lembaga Kemajuan Tanah Negeri Sabah (LKTNS) iaitu dengan secara curangnya menyembunyikan tawaran PPB Sdn Bhd yang kamu ketahui pada 13hb September 1996, yang telah memperuntukkan 5 saham PPB Oil Palms Sdn Bhd bagi 1 saham SAPI Plantations Sdn Bhd di dalam cadangan PPB Oil Palms Sdn Bhd untuk disenaraikan di papan utama Bursa Saham Kuala Lumpur, dan dengan itu telah dengan sengaja mendorong ahli-ahli mesyuarat LKTNS untuk meluluskan penjualan 16.8 juta saham LKTNS di dalam SAPI Plantations Sdn Bhd kepada Briskmark Enterprise Sdn Bhd yang mana sekiranya mereka diberitahu mengenai tawaran itu, mereka tidak akan meluluskan penjualan saham tersebut; dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 417 Kanun Keseksaan.

[6] The essence of the second charge is that the accused deceived the members of the board of SLDB by dishonestly concealing to them the offer made by PPB Sdn Bhd ('PPB') of which he had knowledge of on 13 September 1996, to allot five PPB Oil Palms Sdn Bhd ('PPBOP') shares to every one SAPI share in its proposal to be listed in the Main Board of KLSE and by this concealment the accused did thereby intentionally induced the members of SLDB to approve the sale of 16.8 million shares of SAPI owned by SLDB to Briskmark which they would not have approved had they known of the PPB's offer.

INGREDIENTS/ELEMENTS OF THE CHARGES

[7] The first charge preferred against the accused is under s 2(1) of Ordinance 22, which reads as follows:

> 2 Corrupt practice
>
> (1) Any Member of the administration or any Member of Parliament or the State Legislative Assembly or any public officer, who while being such a Member or officer commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for

a term not exceeding fourteen years or to a fine not exceeding twenty thousand ringgit or to both such imprisonment and fine.

[8] Section 2(2) defines 'corrupt practice', and 'public officer' as follows —

2(2) For the purpose of this section

'Corrupt practice' means any act done by any Member or officer referred to in subsection (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; and without prejudice to the foregoing, in relation to a Member of a State Legislative Assembly includes any act which is contrary to the provision of subsection (8) of section 2 of the Eight Schedule to the Federal Constitution or the equivalent provision in the Constitution of a State;

'public officer' has the meaning assigned to it in section 2 of the Prevention of Corruption Act 1961.

[9] Section 2 of the Prevention of Corruption Act 1961 ('PCA') defines public officer and public body as follows:

'public officer' includes any person in the permanent or temporary employment of a public body.

'public body' includes —

(a) The Government of Malaysia;

(b) The Government of a State;

(c) Any department, service or undertaking of the Government of Malaysia or a State;

(d) Any corporation, council, board, commissioners or other body which has power to act under and for the purpose of any written taw in force in Malaysia or any part thereof relating to local government, public health or undertakings of public utility, or otherwise has power to administer funds belonging to any Government in Malaysia, or money raised by rates, taxes or charges in pursuance of any written law in force in Malaysia or any part thereof;

[10] A number of cases has discussed the ingredients that need to be proved to establish a case under s 2(1) of the Ordinance 22.

[11] In *Public Prosecutor v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 Ajaib Singh J at p 168 paras B–C:

... in order to establish a case against him, the prosecution has to prove two ingredients namely that he was a public officer and that while being such officer he committed a corrupt practice.

[12] In *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230, Wan Yahya said at p 232 paras H–I:

Now, what are the ingredients of the charge of corrupt practice under s 2(2) of the Ordinance? The prosecution will have to prove the following:

(1) That the accused was a member of the administration; and

(2) That in such capacity —

(a) he used his position for his pecuniary or other advantage; or

(b) he took part in the Executive Council on a matter relating to his trade, business or profession; or

(c) he took part in any decision likely to affect his pecuniary interest therein.

[13] In *Datuk Tan Cheng Swee & Ors*, on appeal, Chang Min Tat FCJ delivering the judgment of the Federal Court said at p 174:

... to sustain the charge of corrupt practice the prosecution must prove that the accused was acting as a public officer and that the act he committed accrued to his pecuniary or other advantage.

[14] The word 'public officer' has been defined in a number of cases.

[15] In *Public Prosecutor v Datuk Tan Cheng Swee* [1979] 1 MLJ 166 Chang Min Tat FCJ held that a Commissioner of Malacca who was given the power to exercise the functions of the Municipal Council by virtue of s 398(3)(i) of the Municipal Ordinance is by virtue of s 2 of the PCA deemed to be a public officer.

[16] His Lordship stated at p 177 para C that the word 'include' in s 2 of the PCA 1961 (allows the court) to apply the principle that the greater could and should include the less.

[17] Further His Lordship stated:

A public officer for the purposes of the Ordinance No 22 of 1970 is by reason of the use of the word 'includes' in contradistinction to the narrower term 'means', not restricted to the class of persons in the temporary or permanent employment

of a public body. We shall not attempt, even if we are capable of it, an exhaustive definition of a public officer, where the Legislature has failed to provide.

In *Henley v The Major and Burgesses of Lyme* (1830) 103 ER 995, Best CJ had to decide on what constituted a public officer. In his opinion:

> everyone who is appointed to discharge a public duty and received a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer.

In *Whitaker* [1914] 3 KB 1283, the Court of Criminal Appeal of England held that a colonel in command of a regiment of His Majesty's Army is a public officer and guilty of the common law misdemeanor of accepting as a public officer a bribe from a firm of caterers as an inducement to accept their representatives as tenant of the regimental canteen. Per Lawrence J, in delivering the judgment of the court at p 1296:

> A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharged, he is a public officer.

We accept that a public officer in the context of the relevant ordinance is an officer who discharges any duty in the discharge of which the public are interested, more so if he is paid from public funds.

[18] In *Public Prosecutor v Baldev Singh Gurcharan Singh* [1997] 1 CLJ 488, it was held that the term 'public servant' should be anonymous with the term 'public officer' as defined under s 3 of the Interpretation Acts 1948 and 1967 ('Act 388'). 'Public officer' in Act 388 is defined as a person lawfully holding, acting in or exercising the functions of a public office and 'public office' is defined as an office in any of the public services.

[19] The word 'corrupt' has been given a comprehensive definition. In *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15 and at p 22, Raja Azlan Shah FCJ (as he then was) said:

> 'Corrupt' means 'doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions' (see *Lim Kheng Kooi v Reg* [1957] MLJ 199) 'purposely doing an act which the law forbids' (see *R v Smith* [1960] 1 All ER 56). 'Corrupt' is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil or guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section.

[20] [Therefore], in order to prove the first charge against the accused, the prosecution has to establish three essential ingredients, that is:

(a) that he was a public officer at the material time (chairman of SLDB) and that while being such public officer (chairman) he committed a corrupt practice;

(b) the accused used his position (as chairman of SLDB) for pecuniary advantage (conflict of interest) by taking part in making the decision on 22 October 1996 in Fairlane Hotel, Kuala Lumpur in approving the proposed sale of 16.8 million shares of SAPI owned by SLDB to Briskmark; and

(c) the conflict that he put himself in was with respect to being promised 3.36 million of SAPI shares by Datuk Wasli bin Mohd Said.

[21] It is crucial that to sustain a charge of corrupt practice (conflict of interest), the prosecution must prove that the accused was acting as a public officer and that the act he committed accrued to his pecuniary advantage (3.36 million SAPI shares).

[22] The second charge preferred against the accused is under s 417 of the Penal Code. Section 417 reads as follows:

417 Punishment for cheating

Whoever cheats shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

[23] The word cheating is defined under s 415 of the Penal Code which reads as follows:

415 Cheating

Whoever by deceiving any person, whether or not such deception was the sole or main inducement —

(a) fraudulently or dishonestly induces the person so deceived to deliver any property or any person, or to consent that any person shall retain any property; or

(b) intentionally induced the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,

A is said to 'cheat'.

[24] Explanation 1 of s 415 states that a dishonest concealment of facts is a deception within the meaning of the section.

B

[25] Therefore the essential ingredients to prove the second charge are that:

(a) the accused during the SLDB board of directors ('BODs') meeting on 22 October 1996 in Fairlane Hotel, Kuala Lumpur deceived the members of the board by dishonestly concealing PPB's offer of five PPBOP shares for every one SAPI share which offer he knew on 13 September 1996;

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(b) by concealing the PPB's offer, the accused intentionally induced the members of the board to approve the safe of SAPI shares owned by SLDB to Briskmark;

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(c) the members of the board would not have approved the sale of 16.8 million SAPI shares to Briskmark had they been aware of PPB's offer; and

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(d) the act of the accused caused damage to SLDB in that SLDB suffered a loss of RM137,524,986.26.

[26] It is crucial that to sustain a charge of cheating, the prosecution must prove:

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(a) that before Briskmark offered to buy SAPI shares there was a better offer from PPB (one SAPI share for five PPBOP shares, also known as 'the 5:1 offer'). It is alleged that the accused knew about the PPB's offer before the SLDB's board meeting on 22 October 1996. The prosecution must prove that the accused had dishonestly concealed the PPB's (5:1) offer during the SLDB's board meeting on 22 October 1996 and that the directors of SLDB were not aware at all of this offer; and

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(b) that the accused used his position and influenced the BODs of SLDB to approve the sale of 40% share in SAPI to Briskmark, and that if the BODs had known of the PPB's (5:1) offer, the BODs would not have approved the sale of 40% SAPI shares to Briskmark as apparently SLDB could benefit more from the PPB's deal rather than the Briskmark's deal.

H

I

BURDEN OF PROOF

[27] The standard of proof on the prosecution at the close of its case if governed by s 180 of the Criminal Procedure Code which reads as follows:

180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prime facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[28] In determining whether a prima facie case has been proven at the end of the prosecution's case, Mahadev Shankar JCA in *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562 had this to say at pp 575–576:

> ... standing by itself, the term 'prima facie' means 'at first sight'. But a 'prima facie' case means a case has proceeded to that stage where it is regarded as proved because the evidence led supports such a finding if evidence to the contrary is disregarded. See *Black's Law Dictionary* (4th Ed) which goes on to say:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.

[29] This definition is no different from that contained in *Mozley and Whiteley's Law Dictionary* (11th Ed, 1993) which reads (at p 208):

> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[30] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63, Augustine Paul J made the following observation which has since received approval sub silentio from the Federal Court (see [2002] 3 MLJ 193):

> A prima facie case rises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such at that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the

charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

[31] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 it was held that:

> The correct test to be applied in determining whether a prima facie case had been made out under s 180 of the Criminal Procedure Code (and this would apply to a trial under s 173 of the Code) was that as encapsulated in the judgment of Hashim Yeop Sani FCJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor*. Therefore, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?' If the answer was in the negative, then no prima facie case had been made our and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to maximum evaluation to determine if the defence was to be called did not mean that the prosecution had to prove its case beyond a reasonable doubt at this intermediate stage (see paras 80H–I, 81D–E, 85E); *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 followed.

[32] The proposition in *Looi Kow Chai* has been affirmed by the Federal Court in two judgments viz *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 per Augustine Paul JCA (now FCJ); and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 per Gopal Sri Ram JCA (now FCJ).

[33] In the Federal Court case of *Balachandran v Public Prosecutor* it was held that:

> ... a 'prima facie case' case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence must be such that it can be overthrown only by evidence in rebuttal ... In order to make a finding either way the court must, at the close of the case for the prosecution, *undertake a positive evaluation of the credibility and reliability of all the evidence* adduced so as to determine whether the elements of the offence have been established.

[34] And in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 His Lordship Gopal Sri Ram speaking for the Federal Court summarises it as follows:

(i) at the close of the prosecution's case, subject the evidence fed by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then a ...;

(iii) prima facie case has not been made out and the accused should be acquitted;

[35] In summary, what emerges from these illuminating judgments is that a 'prima facie' case contrary to s 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

[36] And if I may add further, a maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16) and if the evidence admits of two or more inferences (see *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230 and *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1), then the inference that is most favourable to the accused shall be drawn.

THE CHRONOLOGY OF EVENTS AS LAID DOWN BY PROSECUTION WHICH LED TO THE COMMISSION OF BOTH OFFENCES BY THE ACCUSED

The formation of SLDB Privatisation Steering Committee and Consultant

[37] In early 1995 SLDB formed a committee known as Privatisation Steering Committee and Consultancy ('PSC'). This committee worked as a tool to ensure the aim in corporatising SLDB became a reality.

Offers from PPB to SLDB

[38] PPB vide a letter dated 11 November 1995 (P59) which is enclosed with the discussion paper dated 8 November 1995 (P58) had invited SLDB to participate in the merger and listing of all East Malaysian oil palm companies. This exercise will involve among others SLDB's shares in SAPI whereby SAPI's shareholders will inject their shareholding into PPB's proposed company called Newco in exchange for Newco's shares.

[39] On 5 January 1996, PPB made their detailed offer to SLDB vide their letter dated 5 January 1996 to merge and form a new listing company (P8). This letter was personally addressed to the accused.

[40] This offer includes the offer to buy LDEO and SAPI shares of which SLDB has 46% and 40% interest respectively.

Accused's letter to the Sabah's Chief Minister

[41] On 2 January 1996, the accused sent a letter dated 2 January 1996 (P17) to the then Chief Minister of Sabah, Datuk Salleh Tun Mohd Said. In gist, the letter stated that the consent of SLDB was urgently needed in order to execute the merger and listing exercise because PPB had a limited time until 29 February 1996 to forward the proposal to the Securities Commission. Upon receipt of this letter, the Honourable Chief Minister made a note on it stating 'Dipersetujui secara prinsip sekiranya teratur'.

SLDB's reply to the offer by PPB

[42] SLDB through their letter dated 1 March 1996 (P16) replied to PPB's offer stating that SLDB principally agreed to participate in the merger and listing exercise but subject to the approval of SLDB board of directors ('BODs'). It was also stated therein that SLDB was also considering the divestment of 16% of SAPI shares out of the 40% to two local parties in

equal proportion.

SLDB board of directors (BOD) meeting on 28 March 1996

[43] On 28 March 1996, SLDB board of directors had a meeting. The board members were informed of PPB's offer. It was agreed at this meeting that the listing will only involve the shares of SAPI and that SLDB will only sell 16% of the shares from the 40% SLDB shares in SAPI to two companies that are Asam Manis Sdn Bhd and Jenuhara Sdn Bhd.

[44] However the intention of SLDB to sell the shares to the said companies did not materialise because they were not qualified.

[45] The minutes of this meeting was produced and marked P10 whilst the working paper was marked as P20.

Notice of demand from RHB Bank (formerly known as D & C Bank) to the accused

Background of the D&C Bank loan

[46] On the 25 January 1994 an agreement (P70) was concluded between the accused and the late Ismail Abdul Rashid. This agreement was in respect of the sale and purchase of two million Intra Oil Industry (IOS) shares for the purchase price of RM12.133m. The accused was the buyer of these shares whereas Ismail was the vendor.

[47] For this purpose, the accused obtained a loan from D&C Bank ('DCB Bank') for the sum of RM12m in order to pay the purchase price of the IOS shares. An initial payment for the sum of RM10.9m was paid to Ismail bin Rashid by RHB Bank.

[48] The bank requested for the security on the loan.

[49] The bank made several attempts to recover the loan from the accused by issuing three notices of demand at three separate occasions (P65, P87 and P88 refers).

The return of Datuk Wasli Mohd Said to SLDB

[50] On 12 June 1996 PW30, Datuk Wasli Mohd Said reported for duty with SLDB Plantation Management Services Sdn Bhd. Subsequently, on 16 October 1996, the general manager of SLDB, PW1, Datuk Mohd Tahir bin

Jaafar, was transferred to Yayasan Sabah. Upon PW1's transfer, PW30 assumed the post of the general manager of SLDB.

[51] Shortly after his return Briskmark was set up by PW12, William Chia Yaw Phin to purchase 40% SAPI shares owned by SLDB.

[52] Briskmark wrote a letter (P44) dated 1 October 1996 to PW25, YB Datuk Joseph Kurup to buy SAPI shares from SLDB. Briskmark also wrote a letter (P45) dated 5 October 1996 to the chairman of SLDB to buy the whole of SAPI shares. Evidence was adduced that the owners of Briskmark were PW30 and Salim bin Muhammad.

SLDB board of directors meeting on 22 October 1996

[53] On 22 October 1996 the meeting of SLDB board of directors was held at Fairlane Hotel at Kuala Lumpur. That was the only meeting held outside Sabah during the time when the accused was the chairman. The meeting was chaired by the accused. It was resolved in the meeting that 40% SAPI shares owned by SLDB are to be sold to Briskmark. Briskmark's proposal was presented through Board Paper No 27/96 (P208) which was circulated to the members of the board immediately before the meeting. The accused chaired this meeting.

[54] Minutes of the said meeting were produced and marked P145.

[55] An agreement dated 11 November 1996 (P97) was executed in order to give effect to the sale.

Meeting between the accused and DCB (RHB) Bank officers

[56] On 4 November 1996 a meeting between the accused and DCB Bank officers was held whereby the accused declared that 8% of SAPI shares were allotted to him. The minutes were recorded (P86).

[57] On 11 March 1997, at the request of PW30, Datuk Wasli, another meeting was held with the same bank officers. Datuk Wasli briefed the bank officers on the proposed listing of PPBOP shares and how he could assist to resolve the accused problem. The minutes were recorded (P89).

[58] However the bank officers were not convinced by what was said by PW30, Datuk Wasli that the accused had interest in SAPI shares and directed their solicitors to resume with the legal action.

Sale and purchase agreement between Briskmark and PPBOP

[59] On 6 March 1997 Briskmark sold their 16.8 million SAPI shares to PPBOP. In return Briskmark got 80,463,111 new ordinary PPBOP shares at RM1 each. A sale and purchase agreement was executed dated 6 March 1997 (P146).

Authorisation to Vincent Chia to deal with Briskmark shares purchased from SLDB

[60] On 23 July 1997, PW5, Vincent Chia was authorised by PW30, Datuk Wasli to deal and arrange for the finance and sate of all PPBOP shares. A letter dated 23 July 1997 (P100) was signed by PW30 to this effect.

Meeting between the accused and Datuk Khor Chin Poey

[61] The accused went to see PW11, Datuk Khor Chin Poey together with PW5, Vincent Chia. However, only the accused went to meet PW11 in the latter's office.

[62] PW5, Vincent Chia went to see PW9, Bernard Kong Kok Keong ('Bernard Kong') from Innosabah Securities Bhd ('Innosabah') to open up an trading accounts with Innosabah.

The formation of Arkwell Enterprise

[63] PW5, Vincent Chia bought an off shore company which later became known as Arkwell Enterprise Ltd ('Arkwell'). On 25 July 1997 PW5 appointed himself to have the power of attorney (P101) for Arkwell. A trading account for Arkwell was also opened with Innosabah.

[64] On 13 August 1997, 22,250,000 PPBOP shares were transferred and deposited by Briskmark to Arkwell's account with Innosabah (P103).

The selling of PPBOP shares

[65] On 12 August 1997 the PPOBP shares were listed on the main board of KLSE and on 13 August 1997, 22.25 million PPBOP shares were transferred to Arkwell's account by PW30.

PW5's instruction on the proceed of the sale

[66] On 25 August 1997, PW5, Vincent Chia gave a written instruction (P104) to PW9, Bernard Kong to make payments from the proceeds of sale of PPBOP shares to the named persons out of which RM11.5m is to be paid to the accused, RM49.7m to Briskmark and RM70,000 to Lee Kiok Siang and the balance of the proceeds were to be transferred via telegraphic transfer to Arkwell's account with Bank of Canadian Imperial Bank of Commerce in Singapore. PW5, Vincent Chia deposited RM13m into the account of Enlighten Investment Ltd (D107).

Settlement of RHB Bank loan

[67] On 27 August 1997 RHB Bank received RM11.5m as a full and final settlement for the loan (P120). The payment was made through a cheque (P106) drawn by Innosabah Securities Kota Kinabalu. The cheque was remitted by telegraphic transfer from DCB Bank in Kota Kinabalu to DCB Bank at Kuala Lumpur (P119).

THE PROSECUTION'S CASE

[68] The prosecution's case in gist are as follows.

[69] For the first charge:

(a) That the accused was a public officer at the material time.

(b) On 25 January 1994, the accused purchased some very valuable Intra Oil Sdn Bhd shares ('IOS') and obtained a loan from DCB Bank (now known as RHB Bank) for the amount of RM10.9m to finance the purchase of the IOS shares. However the accused was unable to repay this loan of RM10.9m and was indebted to the bank for the said amount. About March 1996, DCB Bank demanded repayment of the loan amount and threatened to initiate legal proceedings against the accused for the recovery of the said loan.

(c) That the accused was desperate for money to repay the outstanding loan with DCB Bank, and was sourcing for funds. The accused as a government servant and chairman of SLDB used his position and influence and 'engineered' the sale of 40% of SLDB's shares in SAPI Plantation Sdn Bhd ('SAPI') to a company named Briskmark Enterprise Sdn Bhd ('Briskmark'). In return, the accused was promised by PW30, Datuk Wasli, (Briskmark's Director/CEO) 8% which is equal to 3.36 million SAPI shares from the 40% shares owned by SLDB which is (equal to 16.8 million of SAPI shares) that has been sold to Briskmark.

The prosecution contends that the source of repayment of the loan to DCB Bank will be from the profits made from the sale of this 8% shares. PW5, Vincent Chia, an accountant and partner of Arthur Andersen Sabah, was engaged to complete this transaction for PW30, Datuk Wasli and the accused.

(d) The accused used his position as chairman of SLDB for his own benefit and personal interest, to influence the SLDB BODs to approve the sale of the 40% shares to Briskmark, when the accused chaired the BODs meeting of SLDB on 22 October 1996 ('the board meeting'). The prosecution must prove that the accused had interest in the approval of the 40% of SLDB's shares in SAPI to Briskmark, (ie by being promised by PW3G Datuk Wasli, 8% of the 40% SAPI shares) and that the accused did not disclose his interest resulting from the sale of the 40% shares to Briskmark at the said board meeting.

(e) That all of 40% SAPI shares (16.8 million) was eventually sold to a new company called PBB Oil Palm Sdn Bhd (PPBOP). These shares were later transferred in stages to an offshore company named Arkwell Enterprise Ltd ('Arkwell') formed by PW5, Vincent Chia, to trade shares including the accused's alleged shares (then in PPBOP). Arkwell later settled the accused's loan with DCB Bank for the amount of RM11.5m from the sale of the shares allocated to the accused. There was a balance of RM13m deposited in a account in a Singapore bank for the accused's benefit.

[70] For the second charge:

(f) That before Briskmark offered to buy SAPI shares there was a better offer from PPB (one SAPI share for five PPBOP shares, also known as 'the 5:1 offer'). It is alleged that the accused knew about the PPB's offer before the SLDB's board meeting on 22 October 1996. The prosecution must prove that the accused had dishonestly concealed the PPB's (5:1) offer during the SLDB's board meeting on 22 October 1996 and that the directors of SLDB were not aware at all of this offer.

(g) The accused used his position and had influenced the BODs of SLDB to approve the sale of 40% SLDB's shares in SAPI to Briskmark, and that if the BODs had known about the PPB's (5:1) offer, the BODs would not have approved the sale of 40% SAPI shares to Briskmark as apparently SLDB could benefit more from the PPB's deal rather than the Briskmark's deal.

THE DEFENCE'S CASE

[71] From the line of cross-examination by the defence counsel, Dato'

Muhammad Shafee Abdullah, I summarise the defence case for both the first and second charge as follows:

For the first charge

[72] The defence case in gist for the first charge are as follows:

(a) The defence did not deny that the accused owed RM10.9m to DCB Bank as a result of a loan he had taken from the bank for the purchase of IOS shares.

(b) The defence admitted that the accused was sourcing for funds and that the accused had asked PW5, Vincent Chia to find buyers for his IOS shares to settle his loan with DCB Bank.

(c) The defence contended that the accused had no interest in the approval on the sale of SAPI shares to Briskmark.

(d) The defence contended that the accused had no interest in the PPBOP shares and that the accused did not receive any pecuniary benefit, ie the proceeds from any sale of the PPBOP shares.

(e) The defence contended that Arkwell was set up by Vincent Chia not upon the instruction of the accused, but that of PW30, Datuk Wasli and PVV5, Vincent Chia to transact in PPBOP shares.

(f) The defence contended that the accused sold his lOS shares to Arkwell for RM24m and part of this proceed (11.5m) was used to settle his loan to DCB Bank. The defence contended that there were simultaneous/parallel transactions which were ongoing ie that date the accused sold his IOS shares which was on 11 August 1997 and the date of the listing of PPBOP shares on the KLSE which was on 12 August 1997. The simultaneousness and proximity of the PPBOP and IOS shares transactions camouflage the entire transaction.

(g) The defence contended that Vincent Chia made secret profits of about RM30m from the sale of PPBOP shares through Arkwell which formed the main part of two civil suits between Briskmark and Vincent Chia and Briskmark and the accused. The secret profits made by Vincent Chia were not known to Datuk Wasli or to the accused. Hence the two civil suits.

(h) The defence further contended that the accused did not know that Vincent Chia was Arkwell and that Vincent Chia had used his secret profits of RM30m (through the transaction of PPBOP shares) to buy

the accused IOS shares for RM24m.

For the second charge

[73] The defence case in gist for the second charge are as follows:

(a) The defence contended that the BODs of SLDB had knowledge of the 5:1 offer by PPB prior to 22 October 1996. Therefore there is no concealment by the accused.

(b) The defence contended that on 22 October 1996, the 5:1 offer by PPB is no longer relevant and is not being considered by the BODs of SLDB since it has been overtaken by events. The events being that:

(i) the offer by the two local bumiputera companies, Jenuhara and Asam Manis superceded the offer by PPB. Though Jenuhara and Asam Manis offers were initially favoured in principle since it was in tine with the government's policy then, it was later abandoned when it was found that the two bumiputera companies had no qualification to purchase the shares.

(ii) Briskmark has written on 5 October 1996 to the accused as chairman of SLDB (P45) offering to buy SAPI shares and this offer by Briskmark was approved (agreed to) on 5 October 1996 (through Briskmark's letter dated 1 October 1996, P44) by PW25, Datuk Joseph Kurup, Minister of Resource Development & Enterprise who is also the Minister in charge of SLDB.

(c) The defence contended that the BODs of SLDB approved the sale of SAPI shares to Briskmark, in line with the privatisation policy of the government then. That Briskmark being a Bumiputera company whose owners, PW30, Datuk Wasli and Salim Mohamad were management of SLDB and experienced in the palm oil industry, is considered a management buy out ('MBO') and therefore favoured by the BODs.

(d) The defence contended that the price offered by Briskmark is a fair price since it offered RM9 per SAPI share which is better than the price offered by PPB and the two other bumiputera companies, Asam Manis and Jenuhara at RM8 per SAPI share. The report by Arthur Anderson ('AA') the consultant company appointed by SLDB was circulated and discussed in the meeting on 22 October 1996. AA recommended a 20% discount to be given to a bumiputera MBO and despite the 20% discount recommendation by AA, Briskmark still paid RM9; RM1 more than that offered by PPB.

(e) The defence further contended that since all the BODs of SLDB were bribed by Datuk Wasli there is no inducement on the part of the accused, since through being bribed by Datuk Wasli the BODs would

A have approved the sale of the SAPI shares to Briskmark on 22 October 1996.

ANALYSIS OF THE PROSECUTION'S EVIDENCE

B *The first charge*

The first issue

C **[74]** That the accused was a public officer at the material time.

[75] There is ample evidence to prove that the accused was a public officer at the material time.

D **[76]** Section 2(1) of the Ordinance 22 used the words 'public officer' and s 2(2) defined 'public body' to have the meaning assigned to it in s 2 of the Prevention of Corruption Act 1961 ('PCA 1961'):

'public officer' includes any person in the permanent or temporary employment of
E a public body.

'Public body' is defined under the PCA 1961:

'public body' includes —

F (a) the Government of Malaysia;

(b) the Government of a State;

(c) any department, service or undertaking of the Government of Malaysia or a State;

G

(d) any corporation, council, board, commissioners or other body which has power to act under and for the purpose of any written law in force in Malaysia or any part thereof relating to local government, public health or undertakings of public utility, or otherwise has power to
H administer funds belonging to any Government in Malaysia, or money raised by rates, taxes or charges in pursuance of any written law in force in Malaysia or any part thereof;

I **[77]** The prosecution's evidence had shown that the accused was the chairman of SLDB's board on 22 September 1996, the Private Secretary to the Yang Terutama Yang Di-Pertua Negeri Sabah Encik Abdul Gafar bin Madin (PW19) was called to testify on the appointment of the accused as chairman of the said board. PW19 testified that the accused was the chairman from 11 July 1994 to 30 June 1996 vide letter of appointment tendered and

marked P248. His appointment was extended further for another three years from 1 July 1996 to 30 June 1999 vide the instrument tendered and marked P249. *The accused appointment was not disputed by the defence throughout the prosecution case*.

[78] SLDB was established under the Sabah Land Development Board Enactment 1981 (Enactment No 23 of 1981) with the purpose to promote and carry out projects for land development and settlement, for making funds available therefore and for purposes connected thereto. Section 3(1) of the Enactment states that there shall be constituted the 'Sabah Land Development Board' which shall be a body corporate with perpetual succession, capable of suing and being sued in its corporate name and with power to purchase or otherwise acquire, hold, and exchange or alienate or otherwise deal with in any lawful manner whatsoever, any property movable and immovable, and to enter into contracts and generally to do such acts and things as a body corporate may do by law and as are necessary for, or incidental to, the carrying out its objects and the exercise of its powers as set out in this Enactment. Section 4(2) of the Enactment states the appointment of the members of the board shall be made by Yang Terutama Yang Di-Pertua Negeri. Part V of the Enactment touches on the functions of the board and its powers are provided under s 25 of the Enactment. Part VI is on the financial provisions and s 26 established Sabah Land Development Board Fund. *SLDB is therefore a public body within the definition of s 2 of the PCA 1961*, it been a corporation or board which has power to act under and for the purpose of any written law in force in Malaysia or any part thereof relating to local government, public health or undertakings of public utility, or otherwise has power to administer funds belonging to any government in Malaysia, or money raised by rates, taxes or charges in pursuance of any written law in force in Malaysia or any part thereof.

[79] SLDB is a public body, since it has sought the guidance of the Minister of Finance and also the consent of the Minister of Resource Development and Environment who was the Minister in charge of SLDB and the then Chief Minister of Sabah for the projects that the board was undertaking. They also include the sale of SAPI shares. For privatisation and corporatisation of SLDB, the board had sought the advice of Federal EPU and prepared a cabinet paper to be distributed for comment by Federal AG, Land Ministry and Finance Ministry before forwarding it to the Federal Cabinet.

[80] Further in the minutes of SLDB board meeting (P50) which was chaired by the accused at p 3 para 16.4 it was recorded that the accused told the board members to safeguard the State interest and not to go against the

A government policies. PW1 in his evidence before the privatisation and corporatisation of SLDB, stated that SLDB was a semi-government body. At p 79, PW1 testified as follows:

> SLDB pada masa itu semi government. SLDB mempunyai banyak harta dalam bidang peladangan di seluruh negeri Sabah. Untuk membawa SLDB kepada satu tahap pengurusan yang lebih balk, kerajaan rasa sudah tiba masa SLDB diperbadankan atau corporatised.

[81] At pp 80–81, SP1 testified:

> Q: Section 24 referred shows the function.
>
> A: Agree that SLDB not created for commercial purposes.
>
> Q: It is basically to promote the well being of settlers of the land.
>
> A: Agree.
>
> Q: Where would SLDB get its financing.
>
> A: From State Government.

[82] Based from the above mentioned evidence, there can be no doubt that the accused was appointed to discharge a public duty as chairman of the board of SLDB which was a public body. Therefore I am satisfied the accused is a public officer within the definition of the Prevention of Corruption Act 1961 and for the purpose of a charge of corrupt practice under Ordinance 22.

The second issue

[83] On 25 January 1994, the accused purchased some very valuable Intra Oil Sdn Bhd shares ('IOS') and obtained a loan from DCB Bank (now known as RHB Bank) for the amount of RM10.9m to finance the purchase of the IOS shares. However the accused was unable to repay this loan of RM10.9m and was indebted to the bank for the said amount. About March 1996, DCB Bank demanded repayment of the loan amount and threatened to initiate legal proceedings against the accused for the recovery of the said loan.

[84] The defence admitted the above position. This admission is contained in the accused's caution statement (D332). As such I will not deal with this issue since it is a non-issue.

The third issue

[85] The accused used his position (as chairman of SLDB) for pecuniary advantage (conflict of interest) by taking part in making the decision on 22 October 1996 in Fairlane Hotel, Kuala Lumpur in approving the proposed sale of 16.8 million shares of SAPI owned by SLDB to Briskmark; and

[86] The conflict that the accused put himself in was with respect to being promised 3.36 million of SAPI shares by PW30, Datuk Wasli bin Mohd Said.

[87] The prosecution's case was grounded on the premise that the accused was a desperate man who 'engineered' the sale of 40% of SAPI shares to Briskmark (PW30) in return for 8% of the said shares to be given to him. The motive for the accused's action was the impending legal action that DCB Bank threatened to take (three notices of demand, P65, P83 and P87 issued on 21 March 1996; 10 October 1996 and 13 May 1997 respectively by Messrs Lee Hishammudin) for the recovery of the loan repayment of IOS shares which is due from the accused.

[88] The prosecution's case is anchored and rest heavily on the evidence of two star prosecution witnesses; PW30, Datuk Wasli bin Mohd Said and PW5, Vincent Chia Ka Soon. Datuk Wasli was the general manager ('GM') of SLDB who later became the owner of Briskmark through a management buy out ('MBO'). Vincent Chia Ka Soon, apart from the many positions he held, is the accountant and partner of AA, Sabah, the consultant of SLDB and the adviser to Datuk Wasli and Briskmark. The evidence of these two key witnesses must be carefully analysed in the light of the documentary evidence available and supported by oral evidence of other witnesses before a case can be made out against the accused.

The evidence of PW30, Datuk Wasli bin Mohd Said ('Datuk Wasli')

[89] The evidence of Datuk Wasli in gist are as follows.

[90] He was the GM of SLDB from 1994–1995. In 1995 he was asked to take study leave. On 12 June 1996 he returned from England and reported for duty as managing director of SLDB Plantation Management Services Sdn Bhd. The GM of SLDB at that material time was PW1, Datuk Mohd Tahir. Datuk Mohd Tahir was later transferred out of SLDB on 16 October 1996 and he Datuk Wasli assumed the post GM of SLDB.

[91] PW12, William Chia Yaw Pin ('William Chia') met Datuk Wasli and suggested that he set up a bumiputera company to buy SAPI shares from

SLDB through a MBO. William Chia set up a company, Briskmark for this purpose. William Chia then drafted a letter for Briskmark dated 1 October 1996 (P44) to PW25, YB Datuk Joseph Kurup, Minister of Resource Development and Entrepreneurship who is the Minister in charge of SLDB to purchase 40% SAPI shares owned by SLDB. William Chia also drafted another letter for Briskmark, dated 5 October 1996 to chairman of SLDB to buy 40% of SAPI shares. 40% is the whole amount of SAPI shares owned by SLDB. Datuk Wasli testified that William Chia is the 'architect' since he initiated the whole idea of the MBO and he Datuk Wasli only executed the 'plan'. Datuk Wasli testified that William Chia told him that 8% of the 40% SAPI shares will be sold to the chairman. On 5 October 1996 Datuk Wasli handed the letter P45 personally to the accused and asked the accused in gist whether William Chia mentioned about the 8% and according to him the accused nodded and said that he will look into it. From the nodding and the accused's answer, Datuk Wasli presumed that the accused understood what he, Wasli meant.

[92] *On the meeting on 22 October 1996* Datuk Wasli stated that Briskmark's proposal to buy 40% SAPI shares was presented through Board Paper No 27/96 (P208) which was circulated before the meeting. Before the meeting, he had seen and met all the BODs to get their support for his proposal and promised them, except the accused, RM500,000. The accused chaired the meeting and he and Salim Mohamad declared their interest and left the meeting room.

[93] When he and Salim were called back to the meeting room, he was informed that the BODs had approved his proposal. An agreement dated 11 November 1996 (P97) was executed between Briskmark and SLDB to give effect to the sale of the 40% SAPI shares to Briskmark.

[94] On 6 Mac 1997 Briskmark sold 16.8 million shares to PPBOP. In return Briskmark received 80,463.111 new ordinary PPBOP shares at RM1 each. A sale and purchase agreement was executed (P146). On 23 July 1996 Datuk Wasli authorised Vincent Chia to deal and arrange for the finance and sale of all PPBOP shares. A letter dated 23 July 1996 was signed by PW30 to this effect (P100). On 12 August 1997 the PPBOP shares were listed on the main board of the KLSE. On 13 August 1997 22.25 million PPBOP shares were transferred and deposited by Briskmark to Arkwell's account with Innosabah. A security transfer request (P103) was presented to PW30, Datuk Wasli by PW5, Vincent Chia for his signature and he signed to effect the transfer. PW30, Datuk Wasli agreed that PW5, Vincent Chia dealt with many transactions simultaneously.

[95] *On the accused's loan to DCB Bank*, Datuk Wasli testified that he was asked by the accused to see PW4, Rossana Annizah bt Ahmad Rashidi on 11 March 1997 and to tell her that he was to sell 8% of SAPI shares to the accused which is equivalent to 16 million PPBOP shares. *Datuk Wasli also testified that he did not know why the accused asked him to say this to Rossana Annizah*. He said he met Rossana Annizah only once and what the accused wanted him to say to Rossana Annizah is reflected in the letter, P90. P90 is a letter drafted by PW5, Vincent Chia dated 16 May 1997 from Briskmark, signed by PW30, Datuk Wasli to Manager of DCB Bank, to the attention of Rossana Annizah, carbon copied to Vincent Chia, introducing Vincent Chia as Briskmark's financial consultant. The letter also stated that Datuk Wasli's 'associate' (according to Datuk Wasli 'associate' refers to the accused) preferred DCB Bank to finance the 16 million PPBOP shares which will be sold to the accused.

The evidence of PW5, Vincent Chia Ka Soon ('Vincent Chia')

[96] The evidence of Vincent Chia in gist are as follows.

[97] He was the partner in Arthur Andersen & Co. He prepared the AA report on the privatisation on SAPI shares (P95). He was the adviser to SLDB. He was the adviser and the company secretary to Datuk Wasli and Briskmark. He as a partner in Arthur Andersen is the stakeholder in respect of SAPI shares between SLDB and Briskmark. He was the owner of Arkwell. He was the stakeholder of the sale and purchase agreement (D167) between the accused and Arkwell dated 11 August 1997.

[98] Vincent Chia testified that he was approached by Datuk Wasli in his personal capacity (before the listing of PPBOP). Datuk Wasli informed him that 16 million of PPBOP shares will be sold to the accused at slightly above cost and the remaining of the PPBOP shares belong to Briskmark. Datuk Wasli asked him to get buyers for the PPBOP shares before listing so that upon listing the transaction can go through. Datuk Wasli then gave him a letter of authorisation (P100) dated 23 July 1997 which authorised him to deal and arrange for finance of the PPBOP shares. The letter also confirmed that Briskmark is the registered owner of 86,463,111 ordinary shares of PPBOP which will be listed on the Main Board of KLSE in August 1997.

[99] Vincent Chia testified that he went to see the accused on the instruction of Datuk Wasli to enquire whether the accused needed assistance to find buyers for his PPBOP shares. The accused informed Vincent Chia that he had found a buyer, PW11, Dato' Khor Chin Poey (chairman of PPB and director for SAPI Plantation Bhd) and the accused brought him to Dato' Khor's office. At Dato' Khor's office, he waited outside with PW10 Tan Teong

Boon, who is PPB's company secretary while the accused went in to see Dato' Khor. The accused then came out from Dato' Khor's office and informed him that the PPBOP shares were sold at RM3.80 per share and to deal with Tan Teong Boon on the sale. Vincent Chia then arrange for Tan Teong Boon to meet PW9, Bernard Kong Kok Keong, chief executive officer (CEO) of a stock broking firm Innosabah Securities. Tan Teong Boon was to deal directly with Bernard Kong to arrange for the sale of 16 million of the accused's shares.

[100] Vincent Chia then went to Singapore to set up an off shore company at the request of the accused.

[101] After 22.25 million PPBOP shares were deposited by Datuk Wasli into Arkwell's account in Inossabah Securities (P103) the shares were transacted by Vincent Chia. Vincent Chia (through Arkwell) then gave instruction to Innosabah through letter dated 25 August 1997 (P104) to pay the proceeds of the 22 million PPBOP shares to the accused (RM11.5m); to Briskmark (RM49.7m); to Lee Kok Siang a broker (RM70,000) and the balance of the proceed to be paid into Arkwell's account in Canadian Imperial Bank of Commerce, Singapore.

[102] *On the IOS shares*, Vincent Chia admitted that once the RM11.5m was received by the DCS Bank, he received 2 million of the IOS share certificates and transfer deed from the said bank. He agreed that there was a sales and purchase agreement between the accused and Arkwell dated 11 August 1997 (D132) pertaining to the sale of IOS shares to Arkwell. However, Vincent Chia maintained that everything pertaining to the sale of IOS shares to Arkwell was a 'cover up' and all the documents prepared by him were upon the instruction of the accused. He admitted that he did not have the power of attorney from the accused to act on the accused's behalf but claimed that there were written instructions from the accused to that effect.

[103] *On the formation of Arkwell*, Vincent Chia testified that Arkwell was formed as a vehicle to transact the 16 million PPBOP shares 'off shore' at the instruction of the accused. Subsequently, on cross-examination, he admitted that Arkwell was not solely set up to benefit the accused since Arkwell also transacted shares for Briskmark. Apart from that Arkwell bought and sold shares in the open market on its own behalf and by that he meant on his own behalf. He admitted he is Arkwell and he had made money from Arkwell. He contended that as Arkwell is a separate legal entity and an 'off shore' company it is not required to prepare any documents or to make any declaration to the Inland Revenue Board. Likewise there is no requirement to give the names of shareholders or prepare statement of accounts for audit purposes.

[104] Vincent Chia testified that he had never negotiated with DCB Bank pertaining to accused's loan to DCB Bank. He had never called DCB bank or acted for the accused on the accused's IOS shares. He admitted that PW8, Hoi Teck Huat and PW18, Yau Ah Lan @ Fara Yvonne ('Yvonne Chia') did call him on the phone pertaining to the PPBOP shares.

[105] *On the secret profits*, Vincent Chia denied making RM30m secret profits from the sale of PPBOP shares and using those profits to purchase IOS shares from the accused.

[106] *Back to the third issue*, it was never denied that the accused as chairman of SLDB did chair the board of directors meeting on 22 October 1996 and as such he did take part in the approval of 40% of SAPI shares owned by SLDB to Briskmark. It was also not denied that the accused did not declare his interest in the sale of SAPI shares to Briskmark. This is so, since as contended by the defence, there was nothing to declare; there was no conflict of interest since the accused did not receive any pecuniary advantage from the sale of SAPI shares to Briskmark. The only people who declared an interest were PW30, Datuk Wasli and Salim Mohamad, the owners of Briskmark whose proposal to buy SAPI shares was before the board of directors on that day. Both of them went out of the meeting room when their proposal was discussed on that day.

Conduct of the accused prior to the board of directors meeting on 22 October 1996 (bribe and threat to PW1)

[107] The prosecution contended that the conduct of the accused before 22 October 1996 indicated that he had an interest in approving the sale of SAPI shares to Briskmark. PW1, Datuk Mohd Tahir bin Jaafar testified that on 9 October 1996 he was offered a bribe valued at RM10m in the accused office if he were to sign the agreement for the sale of SAPI shares before 22 October 1996. If he refused, the accused threatened him with imminent transfer. The offer of the RM10m bribe and the threat of imminent transfer were uttered in the presence of PW11, Datuk Khor Chin Poey and Datuk Khor's accountant. The prosecution contended that the fact that the transfer of Datuk Mohd Tahir did take place on 16 October 1996 to Yayasan Sabah, not long after the threat was uttered and that he jotted what transpired in his diary (P40 and P41) were sufficient to prove that the incident did actually take place. I feel that Datuk Mohd Tahir's allegation of the bribe and threat of imminent transfer was never corroborated by Datuk Khor or Datuk Khor's accountant. Datuk Khor was never asked by the prosecution about any meeting that transpired in the accused's office on 9 October 1996 between him; his accountant, the accused and Datuk Mohd Tahir. Datuk Khor's accountant too was never called as a witness to give evidence in court. As such

the bribe and threat to PW1, Datuk Mohd Tahir was not proven.

THE IOS SHARES

Whether the accused's loan to DCB Bank was paid from the proceeds of the sale of IOS shares to Arkwell Enterprise Ltd or from the proceeds of the sale of PPBOP shares allotted to the accused by Datuk Wasli

[108] As stated earlier the accused obtained a loan facility from DCB Bank (now RHB Bank) in 1994 for the sum of RM12m in order to pay the purchase price of the IOS shares which the accused bought from one Dr Ismail bin Abdul Rashid. DCB Bank requested for security on the loan and sent three notices of demand (P65, P83 and P87 dated 21 March 1996, 10 October 1996 and 13 May 1997 respectively) to the accused through its solicitors, Messrs Lee Hishammuddin. The accused was unable to furnish a bank guarantee or any security and the bank henceforth recalled the loan facility ie terminate the contract between the bank (lender) and the accused (borrower) and demanded the repayment of the amount owing which is RM10.9m plus interest.

[109] Two meetings were held between the bank officers PW4, Rossana Annizah bt Ahmad Rashid who is Head of Division, Corporate Banking and PW8, Hoi Teck Huat who is Head of Division for Special Assets and Recovery; one meeting was held with the accused and the other meeting was held with PW30, Datuk Wasli. In the minutes of a meeting (D89) attended by PW30, Datuk Wasli on 11 March 1997, PW8, Hoi Teck Huat at line 1, in the first para noted as follows:

> En. Wasli Mohd Said, an associate of DKG requested for a meeting to brief us on the position of the proposed listing of PPB Oil Palms Bhd (PPBOP) and how he could assist to resolve DKG's matter.

[110] In para (b) of the same page, PW8 noted as follows:

> En. Wasli advised that any subsequent divestment to DKG would have to be after the listing and MITI's further approval is required. *As it stands, DKG has no direct interest in the listing exercise*.

[111] As can be seen this meeting held on 11 March 1997 was at the request of Datuk Wasli who briefed the bank on the proposed listing of PPBOP shares and how he Datuk Wasli could assist to resolve the accused loan repayment.

[112] DKG refers to the accused. What is interesting here is that Datuk Wasli informed Hoi Teck Huat that the accused 'has no direct interest in the listing exercise'.

[113] This according to learned defence counsel Dato' Shafee implied that the accused had no interest in the sale of SAPI shares to Briskmark which shares subsequently was listed in the KLSE through the Newco PPBOP shares. The notation by Hoi Teck Huat hence exculpates the involvement of any conflict of interest by the accused.

[114] The bank unreservedly accepted Datuk Wasli's word that the accused has no direct interest in the PPBOP listing exercise. This can be seen in the notation in D89 by the General Manager of Credit Control and Supervision, Mr Lai Nam Kiang who wrote on 12 March 1977 to PW18, Ms Yvonne Chia, the CEO of DCB Bank as follows:

> Since borrower has no direct interest in the listing, we may have to build up pressure by resuming the legal action.

[115] The bank then subsequently issued the third notice of demand to the accused which was dated 13 May 1997 (P87).

[116] PW18, Yvonne Chia, in her evidence stated that the accused has no interest in the listing. PW4, Rossana Annizah in her evidence said that she believed that the facts gathered by the bank concerning the accused mostly came from the accused's office and that it was usually PW8, Hoi Teck Huat who would speak to PW5, Vincent Chia to get these facts. She believes Vincent Chia was representing the accused. She further agreed in cross-examination that there was no clear representation by the accused that he had an interest in the listing of PPBOP shares and that if there was clear representation by the accused of his interest, the bank would have certainly ensured that this representation would have been reduced into writing and signed by the accused and herself, and in this case there was none.

[117] The prosecution then referred to P86, a minute meeting recorded by PW8, Hoi Teck Huat dated 4 November 1996 which contains the allegation that the accused represented to the bank that 8% of SAPI shares acquired by Briskmark will be allotted to the accused at RM9 per share. The prosecution further relied on P90, a letter dated 26 May 1997 from Datuk Wasli which stated that his 'associate' (meaning the accused) preferred the bank to finance the accused's purchase of PPBOP shares. The prosecution contended that these two letters and the letter D89 clearly incriminates the accused and reflect his interest in the PPBOP shares.

[118] The defence submitted that if PPBOP shares were later purchased by the accused as suggested by the letter, P90 (which the defence denies) and that PW30, Datuk Wasli requested the bank to finance it, it carries no negative element as against the accused, as it is a legitimate transaction. The defence contended that P90 is nothing more than the accused way (borrower's tactic to try to impress upon the bank to prolong the period of payment and to convince the bank that they have the source of income for repayment of the loan). As such it should not be read to indicate that the accused actually had interest in the sale of the PPBOP shares.

[119] The defence admitted that the accused was sourcing for funds to repay his loan to DCB Bank. The accused had asked PW5, Vincent Chia to find buyers for his IOS shares for this purpose. On 11 August 1997 the accused managed to sell his IOS shares and wrote a tetter (D92) to PW8, Hoi Teck Huat dated 11 August 1997 informing him that the buyers of IOS shares will pay RM11.5m as full settlement for the accused's loan to the bank. The accused directed the bank to deliver all his IOS shares to Arkwell or its agents upon satisfaction of payment of RM11.5m. Hoi Teck Huat in his evidence admitted receiving this letter (D92) and the RM11.5m. Clearly from this letter, the repayment of the loan from the proceeds of the sale of IOS shares was arranged by Arkwell or its agents (Vincent Chia). The sale was concluded with the signing of a sales and purchase agreement dated 11 August 1997 (D132) between the accused and Arkwell.

[120] The prosecution contended that the issue of selling IOS shares was never communicated to the bank prior to 22 October 1996 and as such the sale of the IOS shares could not have been the source of repayment for the loan to the bank. The prosecution also contended that the sale of IOS shares and the sales and purchase agreement dated 11 August 1997, a day before the PPBOP shares were listed on the KLSE on 12 August 1997 also raised suspicion that the sale was not genuine but a sham to camouflage the actual sale of PPBOP shares from which profits from the sale was used by the accused to repay the RM11.5m loan to DCB Bank.

[121] The defence contended the sale of IOS shares to Arkwell was genuine. Arkwell is not a bumiputera company and therefore was not qualified to own IOS shares which were bumiputera shares and due to this the accused had to hold the IOS shares in trust for Arkwell (D143). The defence contended that all the documents (D92, D132 and D143) conclusively proved that there was a genuine sale of the IOS shares to Arkwell and that part of the proceeds of the sale which is RM24m was used to pay for the settlement of the accused's loan to DCB Bank.

[122] From the evidence above, I am of the view that the prosecution has managed to raise strong suspicion that the settlement of the loan to DCB bank by the accused could have come from the proceeds of the sale of PPBOP shares through Arkwell's account. However, in light of D92, D132 and D143 and the evidence of PW4, Rossana Annizah, PW8, Hoi Teck Huat and PW18, Yvonne Chia, all tend credence that the RM11.5m was from the proceeds of the sale of IOS shares to Arkwell. In such circumstances, faced with these two strong possibilities or inferences, and taking into account that the prosecution's case is based on the evidence of mainly two witnesses, PW30, Datuk Wasli and PW5, Vincent Chia whose evidence are tainted with self interest, I am minded, as the law requires, to accept the inference that is most favourable to the accused ie that the RM11.5m for the settlement of the loan to DCB Bank was from the proceeds of the sale of IOS shares to Arkwell. I made this decision, as stated earlier based on the documentary evidence in the form of D92, D132 and D143 which conclusively proved there was a genuine sale of IOS shares to Arkwell. How Arkwell through Vincent Chia paid for it, whether from the secret profits he made or from a buyer (third party) is immaterial since this court cannot act on suspicion in the face of solid documentary evidence which has not been rebutted by the prosecution.

The accused was promised 3.36 million SAPI shares by Datuk Wasli

[123] Further, the issue of 8% or 16 million of PPBOP share were never crystallised in the evidence of PW30, Datuk Wasli. The issue of 8% of PPBOP shares was brought about in the description of the active role of one William Chia (PW12, Chia Yaw Phin). To begin with the prosecution's case as in the first charge (P3) clearly provides that the 8% (or 16 million of PPBOP shares or 3.36 million of SAPI shares) was promised by PW30, Datuk Wasli to the accused. The prosecution sought to introduce this evidence primarily through the testimony of PW30, Datuk Wasli and later referred to the evidence of other witnesses as corroborative evidence (PW5, Vincent Chia, PW4, Rossana Annizah and PW8, Hoi Teck Huat). PW30, Datuk Wasli's evidence as appears at p 797 of the court's notes of evidence 'NOE') clearly negates the contention of the prosecution that PW30, Datuk Wasli was the one who promised the 8% of the PPBOP shares to the accused. The evidence of PW30, Datuk Wasli at p 797 is as follows:

> I was asked to see the Chairman of SLDB i.e the accused by William Chia with this letter. William Chia initiated this idea and he is almost the architect and I execute it according to his plan. That is why I went to see the Chairman of SLDB with this letter. William Chia told me his plan based on the political funding and who to assign the benefits to. He mentioned about the Chairman of SLDB. *He said 8% out of the 40% SAPI shares will be sold to the Chairman. I handed P45 (letter) to the Chairman (accused) around the 5th October 1996 personally. I did ask him in*

gist. I asked him whether William Chia mentioned about the 8% and the accused nodded. The accused said he will look into it. From his nodding and his answer, I presumed that the accused understood what I meant.

[124] The prosecution submitted that these are circumstantial evidence and it clearly shows that on 5 October 1996, the accused was promised 8% or an equivalent of 3.36 million of SAPI shares by PW30, Datuk Wasli. Therefore the accused has some pecuniary interest in the sense that he is going to benefit from the sale of SLDB shares in SAPI to Briskmark when he chaired the board meeting on 22 October 1996.

[125] The prosecution contends that when PW30, Datuk Wasli asked the question to the accused and to that question, the accused nodded his head; it is a promise made by PW30, Datuk Wasli. En Hanafiah submitted that it is not a promise in the ordinary sense of the word but due to the status and positions of the personalities involved few words needed to be said or communicated, to cement an agreement.

[126] In reinforcing his contention, En Hanafiah said that Datuk Wasli also said the same of his communication to the then Chief Minister of Sabah, at p 794 of the NOE, PW30 said:

> During my regular briefings to the CM and briefing on SAPI Plantation, I said in gist that I will honour my political obligations. I don't remember the words I used. The CM said OK. To my understanding it means the CM said it is good that I would honour my political obligations.

[127] The prosecution contended that the communication above is similar; where the Chief Minister said 'OK' when Datuk Wasli said he would honour (his) Datuk Wasli's political obligation it is the same as when the accused nodded his head and said he will look into it. This according to En Hanafiah is sufficient to indicate that there was a promise, an undertaking or a pledge on the part of Datuk Wasli, which promise, undertaking or pledge was accepted by the Chief Minister and the accused respectively.

[128] The prosecution further contended that the communication above is, in the sense of the charge and evidence against the accused, an undertaking or a pledge by Datuk Wasli to the accused that the accused would be getting 8% or an equivalent of RM3.36m SAPI shares. Who else according to prosecution can give the actual promise except the owner or would be owner.

[129] I am of the opinion that the situation and the communications between Datuk Wasli and the Chief Minister and Datuk Wasli and the accused cannot be equated or put on the same level. The Chief Minister's

position as head of the State of Sabah and the position of the accused as chairman of SLDB are worlds apart and are in no way comparable. One would be circumspect and decorous when dealing with a head of state but to one's own chairman, though an amount of restrain or reserve is expected, it would not be to the extent of a mere exchange of a nod and a few curt words to cement a pledge or promise which pledge or promise is duly accepted. As such one would have expected that a reasonable man would try to get a direct positive confirmation if he is dealing with millions of dollars worth of shares and not leave it to a third party ie PW12, William Chia to do the 'bribing' on his behalf. Even if Datuk Wasli had used William Chia as a go between, a prudent and educated man such as Datuk Wasli would, one would expect, elicit a more positive overture from the accused as to the accused 'acceptance' or 'demand' of a bribe. A mere nod of the head and words to the effect that he will took into it, is insufficient, bearing in mind that the accused and Datuk Wasli are not mere strangers but had been working together for a number of years in SLDB.

[130] Further, why was William Chia not recalled to explain on this matter. He is after all according to Datuk Wasli the 'architect' to this whole scheme. Why the reluctance on the part of the prosecution to recall him unless the prosecution had already concluded that the answer elicited would be in the negative and therefore adverse against them. Datuk Wasli was in 'tongue in cheek' on this. He said, 'I asked him (accused) in gist. I asked him whether William Chia mentioned about the 8% and the accused nodded. The accused said he will look into it'. This evidence, I feel, is very vague as Datuk Wasli was not forthcoming. He left everything so uncertain and to the imagination. What did that conversation mean? It has to my mind many connotations and interpretations, with no definite conclusion.

[131] The evidence of PW5, Vincent Chia is not of much assistance either. PW5, Vincent Chia testified and admitted that he did not find any evidence to show that PW30, Datuk Wasli had promised the accused the 16 million of PPBOP shares on or before 22 October 1996 (p 345 of the NOE).

[132] When asked by Dato' Shafee (at p 345 of the NOE) PW5 said this:

S: *I suppose in your mind, this direction to sell shares to accused was done in August 1997. There is no conflict of interest because the decision to sell the shares by SLDB to Briskmark Enterprise Sdn Bhd was in October 1996.*

J: Yes.

S: *If there is a promise by Briskmark Enterprise Sdn Bhd to sell these same shares either on 22 October 1996 or before then there is conflict.*

J: Yes.

S: *You did not find such evidence in this transaction.*

J: *Yes. Datuk Wasli did not inform me that these shares were sold to the accused prior to a promise made by him to the accused, prior to 22 October 1996.*

[133] From the above evidence it is clear that even PW5, Vincent Chia is not aware of any promise made by Datuk Wasli to the accused pertaining to SAPI shares, prior to 22 October 1996 ie before the board sat to approve the sale of SAPI shares to Briskmark. PW5's evidence is further supported by the evidence of the senior DCB Bank officers, PW4, Rossana Annizah, PW8, Hoi Teck Huat and PW18, Yvonne Chia who all in their evidence testified that they believe the accused has no direct interest in the listing of PPBOP shares and as such directed their solicitors to continue to pressure the accused with legal action to recover the overdue loan. With these evidence before me, I feel it is unsafe to conclude, without further oral and documentary evidence in support, that the prosecution has proven that the accused was promised 3.36 million of SAPI shares by Datuk Wasli in exchange for the accused approval for the safe of SAPI shares to Briskmark.

The fourth issue

[134] That all of 40% SAPI shares (16.8 million) was eventually sold to PBB Oil Palms Sdn Bhd (PPBOP), the so called Newco. These shares were later transferred in stages to an offshore company named Arkwell Enterprise Ltd ('Arkwell') formed by PW5 Vincent Chia, to trade shares including the accused's alleged shares (then in PPBOP). Arkwell later settled the accused's loan with DCB Bank for the amount of RM11.5m. There was a balance of RM13m deposited in an account in a Singapore bank for the accused's benefit.

[135] The main evidence in relation to this fourth issue came from PW5, Vincent Chia. The prosecution has contended that all the 40% shares sold to Briskmark were later sold to PPBOP. The shares were later transferred in stages to an offshore company named Arkwell Enterprise Ltd ('Arkwel').

[136] Vincent Chia had testified that Arkwell was formed as a vehicle to transact the 16 million PPBOP shares 'off shore' at the instruction of the accused. Subsequently on cross-examination, he admitted that Arkwell was not solely set up to benefit the accused since Arkwell also transacted shares for Briskmark. Apart from that Arkwell bought and sold shares in the open market on its own behalf and by that he meant on his own behalf. He admitted he is the controlling mind of Arkwell and he has made money from Arkwell. He contended that as Arkwell is a separate legal entity and an 'off shore' company it is not required to prepare any document or to make any

declaration to the Inland Revenue Board. Likewise there is no requirement to give the names of shareholders or prepare statement of accounts for audit purposes.

[137] Vincent Chia at p 216 of the court's NOE said this:

The share involved is the PPBOP amounting to 22,250,000.00.

The depositor is Briskmark Enterprise Sdn Bhd. The document is signed by Wasli. The transferee is Arkwell Ent Ltd. The 22,000,000.00 the 16 million belong to the accused and the balance of 6,250,000.00 belong to Briskmark. The instruction for this transfer of shares came from me with the agreement of Wasli. I only initiated the wrong thing.

Mah: ID103 (Security Transfer Request dated 13.8.1997).

The shares were transferred to Arkwell. Once the PPBOP was listed, the shares were deposited with Innosabah (INS). There was a form to be filled up for this purpose. The shares were sold. If was arranged and agreed that the whole amount of 22.25 million is to be sold to Arkwell. *I authorized the payment on the proceeds of the sale which was made through Arkwell Ent. Ltd.*

[138] And at p 216 of the court's NOE:

TPR: Jilid 4A, D218.

PW5: I am familiar with the document. This letter is to authorize INS to pay from the proceed of the sale of 22 million of PPBOP shares to the following:

(a) Briskmark Enterprise an amount of 49,700,000.00.

(b) The accused an amount of 11.5 million.

(c) Lee Kiok Siang an amount of 70,000.00.

[139] The other witnesses that could confirm the above transactions are PW9, Kong Kok Kiong (Bernard Kong) and PW17, Jenny Minjulin. Both witnesses are privy to the transaction in Innosabah Securities Sdn Bhd.

[140] PW9, Kong Kok Kiong (Bernard Kong) in his evidence described the transaction which was recorded in P126. This can be is seen at pp 293–294 of the court's NOE.

TPR: Jilid 4A dokumen 213.

SP9: This is the client's ledger for Arkwell Enterprise Ltd. It relates to transaction from 10/8/1997–20/8/1997 (1st page). The 2nd page refers to transaction from 20/8/1997–31/8/1997.

Mah: ID126 (1–2).

This document is a computer generated document.

TPR: ID126(1) referred, column DR (Debit Amount).

SP9: The sum stated is RM77,971,340.00. This amount represented a payment that was made, the details of which should be on a document or payment voucher with the reference PV278939.

TPR: Jilid 4A dokumen 219 rujuk (Payment Voucher).

SP9: This is the voucher (Payment Voucher) that I referred to in ID126(1). I cannot recognize the signature under 'approved by' and 'checked by'. The circle with the word BK is not made by me. The initial under the word 'Put to Trust' is Jenny Minjulin.

[141] PW17, Jenny Minjulin testified at p 616 of the NOE, that there was an instruction letter from Arkwell Enterprise Ltd to issue out payments to three parties namely, Briskmark Enterprise, the accused and an individual by the name of Lee Kiok Siang.

TPR: P104B.

I have seen this document before. *This is an instruction letter from Arkwell Ent Ltd to issue out three payments to Briskmark Ent; i.e to Tan Sri Kasitah Gaddam and Mr Lee Kiok Siang*. This is an instruction to Innosabah Securities to pay to the parties stated. The payments were made as instructed.

[142] From the above evidence of PW17, Jenny Minjulin it is evident that the PPBOP transactions were performed under the instruction from PW5, Vincent Chia or Arkwell Enterprise Ltd. PW5, Vincent Chia also testified that the accused was not aware or informed of the setting up of Arkwell. This is shown from various parts of PW5, Vincent Chia's evidence as below.

[143] At p 348 of the court's NOE, Vincent was shown a ledger and he responded:

SP5: This is Arkwell's ledger.

ID126(1) on 12/8/1997, there was a sale of PPBOP at 3.6, again another 3.6 making it to RM20,000,000.00.

J: Yes.

S: On the same date, the fifth transaction, you bought it at RM2.86.

J: Yes.

S: *Who instructed you to purchase this at 2.86 for 1 million shares.*

J: *It was purchased by me from the open market.*

[144] At p 367 of the court's NOE Vincent Chia admitted:

> I operated only one bank account of Arkwell Enterprise Ltd in Singapore which the account I gave earlier. I am the sole signatory and operator of this account. I instructed the bank not to send the account statement to me because I would normally check the statement when I go to Singapore.

[145] At p 373 of the court's NOE, Vincent Chia admitted he never disclosed to the accused that he is Arkwell:

> S: *You never disclosed that Arkwell Enterprise Ltd was you and you were Arkwell Enterprise, to the accused.*
>
> J: *True.*
>
> S: *Who is the controlling mind of Arkwell Enterprise Ltd.*
>
> J: *I am.*
>
> S: You are therefore directly involved in the conspiracy.
>
> J: If that is so, yes.
>
> S: I put it to you, going by your word you are an accomplice which evidence must be corroborated.

[146] Based on the above evidence, PW5's evidence must be treated with some measure of care. The defence contended that Vincent Chia is an accomplice and his evidence in the eyes of the law must be treated with caution. The prosecution contended otherwise, that Vincent Chia is not an accomplice. The prosecution posed some pertinent questions in determining whether Vincent Chia is an accomplice and they are: With whom did PW5, Vincent Chia conspire? Who is the principal offender? The prosecution contended that it cannot be Datuk Wasli since Datuk Wasli is the rightful owner of the SAPI shares. It cannot be PW12, William Chia since William Chia is not a member of the SLDB board of directors.

[147] In light of those questions, I cannot make a finding that Vincent Chia is an accomplice. However from the evidence gathered it is extremely clear that Vincent Chia is an opportunist of the highest order, one without principles or scruples. He put himself in a position of serious conflict of interest by the many 'hats' he wears. He acted as agent cum adviser to AA, SLDB, Briskmark and accused simultaneously and as such put himself in a position of serious conflict of interest. From the evidence, as partner in AA he prepared the AA report on the sale and privatisation of SAPI shares (P95). He is the adviser to SLDB, adviser to Datuk Wasli and Briskmark. He is the stakeholder in the agreement between SLDB and Briskmark in the execution of SAPI shares. He is the alleged representative (according to DCB Bank

officers Rossana Annizah and Hoi Teck Huat) to the accused's dealing with the said bank pertaining to the accused IOS shares. AA (Vincent Chia) was the stakeholder of the sale and purchase of IOS shares dated 11 August 1997 (see D167 sale and purchase agreement between accused and Arkwell dated 11 August 1997).

[148] He is also the owner of Arkwell Enterprise Ltd. He, through Arkwell traded on his own behalf in the open market and made profits. He did not disclose that he is Arkwell to the accused or to Datuk Wasli. Why the non-disclosure?

[149] He is company secretary of Briskmark, an agent and adviser for Briskmark in Innosabah Securities (see P100 which is the authority given to Vincent Chia to deal with PBB Oil Palms Bhd shares dated 23 July 1997). Vincent Chia also established accounts with Innosabah Securities for PPBOP transactions.

[150] All the above roles he played put him is a serious position of conflict and due to this his evidence is tainted and must be sieved through carefully.

[151] The defence contended that the RM11.5m paid for the loan repayment to DCB bank came from the sale of the accused's 2 million IOS shares to Arkwell. The defence contended there were two simultaneous transactions which were on going ie that the accused sold his IOS shares to Arkwell on 11 August 1997 and the listing of PPBOP shares in the Main Board of KLSE on 12 August 1997. The simultaneousness and proximity of the PPBOP and lOS shares transactions camouflage the entire transaction. The defence contended that Vincent Chia used the secret profits he made from the sale of PPBOP shares to buy the IOS shares from the accused. The secret profits made by Vincent Chia were not known to either the accused nor to Datuk Wasli, hence the two civil suit between Briskmark and Vincent Chia and Briskmark and the accused.

[152] As to whether the RM11.5m paid to DCB Bank came from the proceeds of the accused sale of IOS shares to Arkwell or from the proceeds of the sale of PPBOP shares allocated to the accused by Datuk Wasli, my answer and finding is the same as found under the title IOS shares at pp 45–50 of my judgment.

[153] On p 50 I have stated that there are two possibilities or inferences as to the source of the RM11.5m repayment to DCB Bank ie that it could be from the proceeds of the sale of PPBOP shares or from the proceeds of the sale of the accused IOS shares to Arkwell. In such circumstances, I have said that faced with these two strong possibilities or inferences, and taking into

account that the prosecution's case is based on the evidence of mainly two witnesses, PW30, Datuk Wasli and PW5, Vincent Chia whose evidence are tainted with self interest, I am minded, as the law requires, to accept the inference that is most favourable to the accused ie that the RM11.5m for the settlement of the loan to DCB Bank was from the proceeds of the sale of IOS shares to Arkwell. I made this decision based on the oral evidence of PW4, Rossana Annizah, PW8, Hoi Teck Huat and PW18, Yvonne Chia and the documentary evidence in the form of D92, D132 and D143 which conclusively proved there was a genuine sale of IOS shares to Arkwell. How Arkwell through Vincent Chia paid for it, whether from the secret profits he made or from a buyer (third party) is immaterial since this court cannot act on suspicion in the face of solid documentary evidence which has not been rebutted by the prosecution.

[154] Therefore, based on all the evidence above, I am of the opinions that the prosecution has failed to make out a prima facie case against the accused in respect of the first charge.

THE SECOND CHARGE

[155] That before Briskmark offered to buy SAPI shares there was a better offer from PPB (one SAPI share for five PPBOP shares, also known as 'the 5:1 offer'). It is alleged that the accused knew about the PPB's offer before the SLDB's board meeting on 22 October 1996. The prosecution must prove that the accused had dishonestly concealed the PPB's (5:1) offer during the SLDB's board meeting on 22 October 1996 and that the directors of SLDB were not aware at all of this offer.

[156] The prosecution contended that all the BODs of SLDB were aware of the initial proposal by PPB during the course of negotiations between them (P8, P20, P58 and P59 refers). However, the prosecution contended the final offer ratio of 5:1 shares only crystallised on the 13 September 1996 and it is this crystallised offer which the second charge pertains to and not to any prior negotiations between PPB and SLDB. It is the prosecution's contention that the accused had knowledge of this crystallised 5:1 offer and he dishonestly concealed it from the board members.

[157] The defence contended that the BODs and management of SLDB had knowledge of the 5:1 offer by PPB prior to 22 October 1996. This was because PW10, Tan Teong Boon, the company secretary of PPB had sent a letter to the accused as chairman of SLDB on 5 January 1996 (P8) pertaining to this offer. This offer again was presented and explained to the Privatisation Steering Committee (PSC) of SLDB on 22 January 1996. In that slide presentation, many members from SLDB were present. On 28 March 1996

which is the first BODs meeting for the year 1996 the 5:1 offer by PPB was again tabled and board papers P20 pertaining to the 5:1 offer was enclosed in the minutes of the meeting No 1/96 (P19).

[158] The defence maintained that the 5:1 offer had not change from the onstart of negotiations and as such there is no concealment on the part of the accused.

[159] The prosecution called a number of witnesses to prove that the BODs of SLDB were not aware of the 5:1 offer. The witnesses are PW1, Datuk Mohd Tahir bin Jaafar; PW2, Mohd Izzaddin bin Idris; PW5, Vincent Chia Ka Soon; PW10, Tan Teong Boon; PW11, Datuk Khor Chin Poey and PW13, Catherine Yong Shui Han.

FACTS/EVIDENCE OF WITNESSES

PW1 Datuk Mohd Tahir bin Jaafar

[160] PW1, Datuk Mohd Tahir bin Jaafar the former general manager of SLDB testified on the proposed merger and listing of the East Malaysia Plantation Co ('EMPC') and his involvement in the Management and Privatisation Steering Committee ('PSC') in SLDB. He testified in examination-in-chief that SLDB had officially received a proposal of merger and listing of EMPC from PPB vide letter dated 5 January 1996 (P8). In P8, PPB informed SLDB that SLDB owned 40% of SAPI shares which amounted to 16.8 million shares. According to P8, the value of the whole of 40% shares owned by SLDB in SAPI was RM133,914,868. The offer from PPB was to exchange the 16.8 million shares with the Newco shares at RM1.70 per share. This worked out to a ratio of five Newco shares to one SAPI share.

[161] In evidence PW1, Datuk Mohd Tahir when P8 was referred to him stated as follows:

> PW1: I have seen this document (P8).
>
> Q: Between SAPI and Newco you appreciate the calculation here.
>
> A: Yes.
>
> Q: *You agree in this letter there is a calculation and proposal that for each SAPI shares they will be given 5 Newco shares; 5:1.*
>
> A: *Yes.*

[162] Datuk Mohd Tahir then proceeded to state (pp 232 and 233 of the NOE):

A: *I was aware of the 5:1 proposal of 5 Newco to one SAPI share. The management is also aware of the 5:1 offer by PPB and the management has made the Board aware of this 5:1 offer.*

[163] Datuk Mohd Tahir went on the explain that at the Privatisation Steering Committee ('PSC') meeting which he chaired on 4 March 1996, the 5:1 offer was formulated and considered to be tabled at the BODs SLDB meeting on 28 March 1996. At this PSC meeting, PW1, Datuk Mohd Tahir agreed that PW5, Vincent Chia was present and was invited as an 'expert adviser' to explain the 5:1 offer of PPB to the PSC (pp 233–234 of the NOE refer):

Q: On 28 March 1996 you ensure that the Board know about this 5:1 offer from PPB.

A: Yes.

Q: ID 18 Steering Committee on 4 March 1996. You were the Chairman here.

A: Yes.

PB: Paragraph 2.5, 2.6., 2.7, 2.8.

(Indicative timing of corporatization, privatization, listing and EMPC Merger)

Q: *In this meeting you formulated and considered the proposal of PPB and tabled it for the full Board meeting on 28 March 1996.*

A: *Yes.*

Mr Vincent Chia was invited as expert adviser of the SteeringCommittee understood the 5:1 offer of PPB.

PW2 Mohd Izzaddin bin Idris

[164] The evidence of Datuk Mohd Tahir is supported by PW2, Mohd Izzaddin bin ldris, the assistant manager of Malaysian International Merchant Banker (MIMB) and the adviser to PBB pertaining to the proposed merger and listing of EMPC on KLSE. PW2, Mohd Izzaddin played an active role in preparing the discussion or concept papers on the said proposal. PW2, Mohd Izzaddin under cross-examination admitted that PPB's offer as per letter dated 5 January 1996 (P60) is consistent with the 5:1 offer (p 146 of the NOE). His evidence is as follows:

PB: P60 dirujuk.

P60 ambil kira discussion paper bertarikh 8 November 1995 dan discussion paper ialah P58 (Jilid 1 D11).

S: P60 bertarikh 5 January 1996 (final copy). Dalam P60, kamu tunjukkan macam mana SAPI shares dan Newco shares are connected as to ratio the SAPI shares to the Newco which in PPBOP i.e. 1:4.6 and 1:4.7.

J: Ya.

S: This is because Newco shares has change its variable for RM1.40 to RM1.70.

J: Yes.

S: And consequent to that you calculated the IPO you expected RM3.20 to RM3.45.

J: Tidak terbalik daripada RM3.45 to RM3.20 di mukasurat 7.

S: Consequent you estimated SAPI shares to be RM7.99 which was round up to RM8.

J: Yes.

S: *This ratio 1:4.6 and 1:4.7 and same calculation which you round up to 1:5.*

J: *Yes.*

[165] When shown the minutes (P19) and the paper work marked as (P20) tabled at the SLDB BODs meeting on 28 March 1996, in particular appendix IV attached to P20, PW2, Mohd Izzaddin agreed that the calculation arrived at is consistent with the 5:1 offer by PPB. This exh P20 was presented to the BODs of SLDB on 28 March 1996 (p 147 of the NOE).

[166] He further stressed that if anyone were to study MIMB's proposal (P60) it would be apparent that PPB's offer was 5:1 (p 148 of the NOE refer):

Q: *If anyone is to study MIMB's proposal, they would have learned about the ratio one SAPI to 5 Newco.*

A: *Yes.*

[167] PW2, Mohd Izzaddin testified that a briefing and slide presentation was presented to the PSC of SLDB on 22 January 1996. In that meeting many representatives of SLDB were also present. At this slide presentation, he explained to the representatives of SLDB how the ratio of 5:1 was calculated (pp 153–154 of the NOE refer):

PB: (Jilid 1, D21) which is ID21 compare with (Jilid D20a) which is P62A.

A: Yang pasti hadir pada 22 January 1996 ialah CEO saya Cik Yang Shui Yin, Datuk Khor, Encik Tan Teong Boon dan daripada SLDB, Datuk Kasitah Gaddam. *Ada juga pihak lain daripada SLDB tetapi saya tidak cam. Memang ramai yang hadir daripada SLDB.*

[168] PW2, Mohd Izzaddin bin Idris further testified that MIMB has submitted a revised listing scheme of the said merger to the Securities Commission (SC) on 27 June 1996. He agreed that even if Lahad Datu Edible Oil (LDEO) was excluded in the listing exercise, the ratio of 5:1 would still remain unchanged (p 150 of the NOE):

> Q: Even in the revised scheme it is still 1:5. It does not affect your calculation (SAPI shares to PPBOP shares).
>
> A: Yes.

PW5 Vincent Chia Ka Soon

[169] PW5, Vincent Chia who attended the meeting on 4 March 1996 as the project director of AA testified that at the slide presentation (P62G), the ratio of 5:1 did not change. This is an acknowledgement that the ratio of 5:1 was explained at the slide presentation by MIMB to SLDB's representatives and management (p 339 of the NOE).

PW10 Tan Teong Boon

[170] PW10, Tan Teong Boon, PPB's company secretary testified that pursuant to a letter dated 5 January 1996 (P8) from PPB to SLDB, the terms of acquisition of SLDB shares in SAPI Plantation and LDEO are that for 40% shares in SAPI Plantation, Newco is offering a purchase consideration of RM133,914,868. This will be satisfied by the issue of 78,773,457 of Newco shares valued at RM1.70 per share, which is equivalent to an exchange ratio of 4.69 Newco shares for every SAPI share, ie in the ratio of 4.69:1 which if rounded up will equal to 5:1 (p 398 of the NOE):

> PW10: This letter to SLDB for attention of the accused as executive chairman. The terms and conditions of the proposed exercise has now been finalized and PPB enclosed a copy of the proposal dated 5 January 1996 by MIMB for their reference.
>
> The terms of acquisition of SLDB share in SAPI Plantation and LDEO are as follows: (1) for 40% shares in SAPI Plantation, Newco is offering a purchase of consideration of RM133,914,868.00 and this will be satisfied by the issue of 78,773,451 (Seventy Eight Million Seven Hundred Seventy Three Thousand and Four Hundred Fifty One) of Newco shares valued at RM1.70 per share, which is equivalent to an exchange ration of 4.69 Newco shares for every one SAPI share.

[171] In cross-examination PW10, Tan Teong Boon admitted that the figure pertaining to what constitutes the SAPI shares in Newco is within the region of 1:4.7 to 1:5 and this ratio within SAPI and Newco shares are the same irrespective of whether LDEO is going to be injected in the listing or not (p 427 of the NOE).

[172] When referred to P64, PW10, Tan Teong Boon admitted that the ratio of 1:5 was included in the submission (P64) by MIMB to the Securities Commission and that the management of SLDB was aware of this proposal (p 427–428 of the NOE).

PW11 Datuk Khor Chin Poey

[173] PW11, Datuk Khor Chin Poey, the deputy chairman of PPB Group and deputy chairman of SAPI when referred to IDD110, a letter from MIMB dated 2 January 1996, agreed that the exchange ratio is five Newco shares for every one of SAPI share (p 446 of the NOE).

[174] PW11, Datuk Khor Chin Poey admitted that anyone who attended the slide presentation would know of this key element of the 5:1 offer (p 474 of the NOE). He testified that when PPB submitted the proposal for listing to the Securities Commission as in P64, P64A and P64B, it was at an exchange ratio of 5:1 and the management of SLDB has to be aware of it (pp 475–476 of the NOE).

PW23 John Liaw Chee Shing

[175] PW23, John Liaw's evidence is not of much value since he only attended the second board meeting for the year 1996 (No 2/96) on 30 September 1996 and the third board meeting No 3/96 on 22 October 1996. He did not attend the first board meeting No 1/96 on 28 March 1996 when PPB's offer was tabled before the board since he was only appointed as a director of SLDB on 1 July 1996. Therefore he was not aware of any negotiations between SLDB and PPB prior to the date of his appointment. Neither was he aware of the offers made by the two local bumiputera companies Jenuhara and Asam Manis. As such he will not be able to compare their offers (PPB, Jenuhara and Asam Manis) with that of Briskmark's offer.

PW13 Catherine Yong Shui Han

[176] PW13, Catherine Yong Shui Han, a director of SLDB attended the SLDB BODs meeting on 28 March 1996 which discussed the offer made by PPB and the two local bumiputera companies, Jenuhara and Asam Manis. She testified as follows:

> Board papers were circulated giving details of the offer by these 2 companies. The chairman table the meeting. I can identify these documents.
>
> TPR: ID20.
>
> Board papers are from page 1–5.

The gist of the paper were that we were informed of a proposal from PPB to list SAPI Plantation and LDEO and that a proposal was made by PPB to purchase SLDB's shares in SAPI Plantation. However there were two offers from two companies to purchase the shares at the same price that was offered by PPB. The price was RM8.00. The State Government (Sabah State Government) favoured the sale of the said shares to the two local Bumiputera companies of PPB.

In principle the Board decided to follow the ongoing government's polity that is to give to the local Bumiputera companies.

Datuk Tahir Jaafar was the General Manager of SLDB. I recalled he was present at this meeting.

I can identify the documents of the meeting.

[177] From Catherine Yong's evidence it is very clear that PPB's offer was sidelined in favour of the offer made by two local bumiputera companies which is in line with the government's policy then. Since she attended the meeting she also knew of PPB's 5:1 offer which was made earlier to the offers made by the two local bumiputera companies.

[178] Therefore after perusing the evidence of all the witnesses above, I conclude that at least three witnesses (PW1, Datuk Mohd Tahir bin Jaafar; PW2, Mohd Izzaddin bin Idris and PW13, Catherine Yong Shui Han) had positively admitted that members of the board of SLDB knew of the 5:1 offer by PPB.

[179] PW2, Mohd Izzaddin testified that at a briefing and slide presentation to the PSC of SLDB on 22 January 1996 where the PPB's 5:1 offer was explained, apart from the accused, there were many members from SLDB present. He could identify the accused but was unable to identify the others present from SLDB.

[180] PW13, Catherine Yong knew of PPB's 5:1 offer since she averred to it in SLDB BOD's meeting on 28 March 1996. She testified that the PPB 5:1 offer was sidelined in favour of the two local bumiputera companies Jenuhara and Asam Manis in line with the government's policy then.

[181] But the most damaging of all the evidence, was the evidence of PW1, Datuk Mohd Tahir bin Jaafar. Datuk Mohd Tahir admitted unreservedly that both he and management of the board of SLDB were aware of the 5:1 offer as early as January 1996. He further positively asserted that he and management have made the SLDB BODs aware of this 5:1 offer. Considering that PW1 may have an 'axe to grind' against the accused since he in no uncertain terms blamed the accused for his immediate transfer from the prominent and prestigious post as GM of SLDB to a lesser, inconspicuous

post in Yayasan Sabah, his evidence that the SLDB BODs were informed of PPB 5:1 offer should be accepted. His evidence corroborates that of PW13, Catherine Yong.

[182] It is pertinent to note that other than PW13, Catherine Yong and PW23, John Liaw, the other six board members present on 22 October 1996 were not called to testify on this matter. The six board members are Datuk (Datu) Ismail Datuk Jook (deputy chairman); Datuk Hj Salleh Otik; Datuk Hj Kadir bin Pateh; En Laimun Laikim, En Michael Emban and Talib Aning.

[183] From the records of the minutes of the first meeting of the board, No 1/96 on 28 March 1996 (P19) it was minuted that the PPB's paper on 5:1 offer was tabled and discussed. In that meeting three of the BODs, who were present in the third meeting No 3/96 held on 22 October 1996 were also present in the first meeting on 28 March 1996. They are Datuk (Datu) Ismail Datu Jook; Datuk Hj Salleh Otik and En Laimun Laikim. As these three board members were present on 28 March 1996, their knowledge on the 5:1 PPB offer can thus be implied.

[184] It must be remembered that the two charge requires the prosecution to prove the cheating element against all members of the board in order to constitute a complete offence under s 417 of the Penal Code. It is an established principle of law that members of the board which constitute a board of a particular body will function as one entity and in a board meeting every board member is entitled to one vote and the decision of the board is based on the majority of votes cast by the board members. Therefore the failure of the prosecution in not calling the other six board members present in the meeting on 22 October 1996 is detrimental to their case. This is so since it created a big gap in relation to the question of whether the board members were actually cheated by the accused. The application of s 114(g) of the Evidence Act 1950 can therefore be invoked to draw an adverse inference against this failure (*Abdullah Zawawi v Public Prosecutor*; *Lau Song Seng & Ors v Public Prosecutor* [1998] 1 SLR 663; *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 refers).

[185] The accused used his position and had influenced the board of directors of SLDB to approve the sale of 40% SLDB's shares in SAPI to Briskmark, and that if the board of directors had known about the PPB's (5:1) offer, the board of directors would not have approved the sate of 40% SAPI shares to Briskmark as apparently SLDB could benefit more from the PPB's deal rather than the Briskmark's deal.

[186] The defence contended that on 22 October 1996, the 5:1 offer by PPB is no longer relevant and is not being considered by the BODs of SLDB since it has been overtaken by events, the events being:

(a) The offer by the two local bumiputera companies, Jenuhara and Asam Manis superceded the offer made by PPB. Though the two local bumiputera companies, Jenuhara and Asam Manis offers were initially favoured in principle since it was in line with government's policy then, it was later abandoned when it was found that the two companies had no qualification to purchase the share.

(b) That Briskmark had written on 5 October 1996 to the accused as chairman of SLDB (P45) offering to buy SAPI shares and this offer by Briskmark was approved (agreed to) in principle on 5 October 1996 (through Briskmark's letter dated 1 October 1996, P44) by PW25, Datuk Joseph Kurup, Minister of Resource Development & Enterprise who is also the Minister in charge of SLDB.

[187] In dealing with the first charge, PW30, Datuk Wasli testified in court that the idea to set up Briskmark to buy the SAPI shares owned by SLDB was mooted by PW12, William Chia. Datuk Wasli stated that 'William is the architect of the plan, and I execute it'. William Chia suggested to PW30, Datuk Wasli for him to see PW25, Datuk Joseph Kurup who was the Minister of Resource Development and Entrepreneurship and also the Minister in charge of SLDB. PW30 went to see PW25, Datuk Joseph Kurup and managed to get his approval in principle (P44) to buy the SAPI shares. After getting PW25, Datuk Joseph Kurup's approval William Chia then suggested that PW30, Datuk Wasli write to the accused relaying PW30's intention to buy the 40% shares of SAPI in SLDB. This PW30, Datuk Wasli did in his letter dated 5 October 1996 (P45).

PW25 Datuk Joseph Kurup

[188] PW25, Datuk Joseph Kurup testified that Datuk Wasli went to see him in October 1996 with a letter informing of PW30's intention to buy SAPI shares. Datuk Juseph Kurup then made a notation to the chairman of SLDB (accused), 'Dipersetujui sekiranya teratur'. He further confirmed what he meant by the notation was that the application must be examined thoroughly to give a favourable outcome to SLDB.

[189] At pp 741–742 of the NOE, PW25 stated as follows:

> Saya ada lihat surat bertarikh 1/10/1996 daripada Briskmark ini. Surat ditandatangani oleh En. Wasli bin Mohd Said. Secara ringkas, surat ini memohon membeli saham SAPI Plantation Sdn Bhd. Surat tidak jelas sama ada hendak beli 16% atau keseluruhan saham SAPI dalam SLDB.

Selepas itu saya buat catatan yang ditujukan kepada pengerusi SLDB di mana saya kata 'Dipersetujui sekiranya teratur'.

Maksud saya dengan catatan ini ialah ia mesti dikaji dahulu secara mendalam; ia mempunyai syarat iaitu ia mesti diteliti terlebih dahulu sama ada penjualan itu mendatang kepentingan penuh kepada SLDB.

Selain daripada ia dikaji kepentingan penuh untuk SLDB; harga penjualan juga harus berpatutan.

[190] The evidence above shows that even with the approval of the Minister in charge of SLDB who is PW25, Datuk Joseph Kurup, the application ought to be examined and analysed thoroughly to see whether it is favourable to SLDB's interest. With the approval from PW25, Datuk Joseph Kurup PW30 then wrote to the chairman of SLDB (accused). The Briskmark offer was then brought before the board for assessment and examination by the board members with the assistance of professional expert opinion from Arthur Anderson (P95). The Briskmark offer was subsequently tabled in the third meeting No 3/96 on 22 October 1996.

PW23 Liaw Chee Shing ('John Liaw')

[191] As averred to earlier John Liaw's evidence is not of much value since he did not attend the first meeting of the board for the year 1996 which is the board meeting No 1/96 held on 28 March 1996 when PPB's 5:1 offer was tabled. He did not attend the said meeting since he was only appointed as a director of SLDB board on 1 July 1996. As such he was not aware of any negotiations between SLDB and PPB prior to the date of his appointment. He was also not aware of the offer made by the two bumiputera companies, Jenuhara and Asam Manis. Since he is not aware of PPB's and Jenuhara and Asam Manis's offer he will not be able to compare their offers with that of Briskmark's offer.

PW23 Catherine Yong Shui Han ('Catherine Yong')

[192] Of all the witnesses, I found, the evidence of PW13, Catherine Yong very damaging since it was her evidence that nailed the coffin on the prosecution's case.

[193] Catherine Yong is a lawyer by profession and she is a member of the BODs of SLDB. She attended all the board meetings in the year 1996. The first board meeting was held on 28 March 1996 (refer to P19 and P20 which were the minutes of the board meeting No 1/96 and the board papers respectively). She also attended the second board meeting on 30 September 1996 (refer to P50 — the minutes of board meeting No 2/96) and the third

board meeting on 22 October 1996 (refer to D145 — minutes of board meeting No 3/96). She had observed the accused chairing all these three board meetings and she had not made any negative comments on his conduct.

[194] There was no evidence from her that indicated that the accused had misused his position or tried to influence her and the board members in arriving at the decision to approve the sale of the said 40% of SAPI shares to Briskmark. The essence of her evidence is captured in the following manner (pp 486–487 of the NOE):

> In July 1994 I was appointed as a member of SLDB Board until 1999. I sat as a member of Board of Directors my duty is to go through the Board papers and deliberate on matter that required my decision.
>
> I have attended Board meetings relating to disposal of SAPI shares in SLDB.
>
> *On 28.3.1996*, I recalled attending a meeting where the Board was ask to consider the disposal of SAPI shares to 2 companies; Jenuhara and Asam Manis. The accused as chairman of SLDB sat as chairman at the meeting.
>
> Board papers were circulated giving details of the offer by these 2 companies. The chairman table the meeting.
>
> TPR: ID20.
>
> Board papers are from page 1–5.
>
> The gist of the paper were that were informed of a proposal from PPB to list SAPI Plantation and LDEO and that a proposal was made by PPB to purchase SLDB's shares in SAPI Plantation. However there were two offers from two companies to purchase the shares at the same price that was offered by PPB. The price was RM8.00. *The State Government (Sabah State Government) favoured the sale of the said shares to the two local Bumiputera companies of PPB.*
>
> *In principle the Board decided to follow the ongoing government's policy that is to give to the local Bumiputera companies.*
>
> Datuk Tahir Jaafar was the General Manager of SLDB. I recalled he was present at this meeting.
>
> At the subsequent board meeting since we didn't hear about this case, there was no further Board papers on this case, I asked GM Datuk Tahir about it and he replied that *since the two Bumiputera Companies had no qualification to purchase the shares, the proposal was scraped (abandoned).*

[195] Clearly from the evidence of PW13, the BODs of SLDB were aware of PPB's offer and that it was superceded by the offer from the two local bumiputera companies, Jenuhara and Asam Manis who was more favoured since it is was in line with the government's policy then. The BODs would also have known that the offer by Jenuhara and Asam Manis were later abandoned when they were found to be unqualified to purchase the shares.

[196] PW13, Catherine Yong Shui Han then went on the testify as to the conduct of the meeting in question on 22 October 1996. Her narration of facts showed that the accused had conducted the said meeting in a proper and professional manner. In the course of explaining what transpired in the meeting she remembered the role played by the accused as the chairman of the meeting and how the decision was arrived by the board with the assistance of various supporting documents and expert opinion. The working paper of Briskmark's proposal No 27/96 was found in P208 and the expert opinion supporting the proposal is in AA's report P95. At pp 489–493 of the NOE she said this:

> On the 22.10.96, I attended the Board meeting in the morning, was handed the Board papers by the secretary En. Salim Mohamad.
>
> Among the items in the board papers were the proposal by a company, Briskmark Enterprise Sdn Bhd to purchase the entire 40 SLDB shares in SAPI. I received this Board papers and it was circulated to everyone.
>
> TPR: Jilid 2, document 89.
>
> This is the Board paper No. 27/96 which was circulated to members of the Board that day. This is the original document.
>
> DMSA: No objection to it being marked as 'P'.
>
> Mah: P208.
>
> The gist of the Board paper, there was a proposal of a company, Briskmark Enterprise Sdn Bhd to purchase all of the 40% shares of SLDB in SAPI Plantation.
>
> The price offered was at RM9.00 per share. Based on this price SLDB would make a capital gain of RM134,400,000.
>
> *This proposal was made in line with State Government Policy to encourage local Bumiputera participation in the economy.*
>
> This Board papers seek the approval of the Board on this proposal. The total consideration is RM151,200,000 (gross) under page 2 under title 'Financial'.
>
> *The meeting was attended by the full Board* and the chairman was the accused. The company secretary's En. Salim Mohammad took down the minutes of the meeting in the beginning. When the paper for Briskmark to purchase SAPI shares come up, the GM then Datuk Wasli and the Company Secretary En. Salim declared their interest in Briskmark that is the company making the offer and were asked by the accused to leave the room.
>
> The 2 said that they have interest in Briskmark. So they left the room before discussion started.
>
> *The Board members discussed the proposals and conditions of the offer and among other things discussed the pertinent question raised was whether the Minister in charge of SLDB had approved of the proposal or had been briefed and approved of this proposal.*
>
> *The chairman (accused) said that the Minister in charged had approved.*

The second query since Datuk Wasli and En. Salim Mohammad were also the GM and the Company Secretary of SLDB, whether it would be proper for them to buy the shares. *The accused said he leave it to the two men to answer the question.*

The capacity or means of Briskmark to purchase the shares were not raised in this meeting (i.e their financial ability).

TPR: P95 referred.

This is the AA report dated 17/10/96 I referred to. At para 4.0, stated the fair value is RM11.00. But in this case since the purchaser is a management group a discount of up to 25% would normally be given.

And if the discount at 20% the price would be RM8.80 per share. Under the privatization policy of government a discount of 25% is given to Bumiputera.

Based on this report the RM9.00 per share by Briskmark was a fair one since Briskmark was a management group and it is a Bumiputera companies.

It is stated in report that fair value of SIDB's 40% SAPI shares is in the range of RM7.70 to RM11.65 per share.

[197] From the above evidence, PW13, Catherine Yong had described what transpired in the board meeting on 22 October 1996 and how the accused had conducted the meeting accordingly as chairman. PW13, Catherine Yong also observed the participation of the rest of the board members in discussing the merits of the application tabled before the board. She also frequently referred to the decision of the board as a collective decision with supporting documents which was made available to the board of directors at the said meeting.

[198] Further, PW13, Catherine Yong testified that after the board's approval of the sale of 40% of SAPI shares the two interested persons, PW1 Datuk Wasli and Salim Mohamad returned to the meeting room and she observed how the accused himself enquired from them on their capacity to buy the said shares. This is shown at pp 493–494 of the NOE, Catherine Yong stated:

After the Board's approval, the two gentlemen were asked to return to the room.

After the two gentlemen returned to the room, *the accused as chairman asked the two gentlemen of their capacity to buy the shares*. The question was directed to Datuk Wasli i.e can they buy the shares.

Datuk Wasli replied that they are the management 'buy out' and this was in line with the ongoing government policy to participate Bumiputera participation in the private sector.

[199] Later in cross-examination PW13, Catherine Yong further testified that the members of the board relied heavily on the documents such as the AA's report dated 17 October 1996 (P95), and the Minister's approval (P4). She also acknowledged that the sale of 40% of SAPI shares to Briskmark was in line with the privatisation policy then. At p 523 of the NOE, she said this in answer to defence counsel:

> P/B: IDD145 (Minutes of meeting on 22/10/96) para 32.3 at page 8.
>
> S: After considering it in the light of AA's report and the privatization policy of the country and that the Minister concerned has approved of the sale of SAPI share in SLDB to Briskmark do you agree that before decision was made this issued was thoroughly discussed that is the proposition by Briskmark.
>
> J: Yes and the meeting considered AA's report (P95).
>
> S: The meeting decided that selling to Briskmark which is a Bumiputera company is in line with the Privatisation Policy.
>
> J: Yes.

[200] It is revealing to note that in the course of cross-examination PW13, Catherine Yong has agreed with the defence counsel that the board had already decided not to go through with PPB's offer but rather use the two bumiputera companies, Jenuhara and Asam Manis as a precedent or benchmark. She further agreed that the exercise of selling 40% of SAPI shares to Briskmark has similar effect as Briskmark was a bumiputera company. At p 524 of the NOE:

> S: The Board has already decided not to go through PPB offer but through the Bumiputera company.
>
> J: Yes, to the two Bumiputera companies.
>
> S: And in this case, the Board has decided to do likewise to Briskmark which is a Bumiputera company.
>
> J: Yes.

[201] PW13 Catherine Yong further explained that the sale to Briskmark is a management buy out exercise ('MBO') and therefore cannot be compared to PPB's offer on 28 March 1996. An MBO according to her was a special consideration. The fact that Briskmark was also a local bumiputera company from Sabah added to its favour. At pp 524–525 of the NOE; PW13 when cross-examined said this:

> S: When you compare PPB's offer in Mac 28, 1996 and the MBO from Bumiputera company to buy the 40% shares, it cannot be compared.
>
> J: *For the second case the MBO, there was special consideration.*

S: The offer by Briskmark is a management buy out

J: Yes.

S: *And they are local Bumiputera Companies from Sabah*.

J: *Yes*.

S: These 2 factors made it different from PPB's offer.

J: Yes.

S: It is the government's policy then, to transfer to management to do the buy out especially if it is a Bumiputera Company.

J: Yes.

[202] The other considerations given by PW13, Catherine Yong were that the persons who managed Briskmark were capable and had wide experience in running palm oil matters. AA's valuation report (P95) stating that the offer from Briskmark which is RM9 per share, RM1 more than that offered by the PPB added to its advantage. At p 525 of the NOE, she stated this:

S: The two gentlemen as recorded in the minutes En. Salim Mohaamad and Datuk Wasli has experience to run palm mi matters and it is one of the consideration taken by the Board.

J: Yes.

S: Arthur Andersen & Co did said to give 20% to Bumiputera MBO and yet Briskmark paid RM9/-, RM1/- more than that offered by PPB at RM8/-.

J: Yes.

[203] PW13, Catherine Yong further agreed that PPB's offer and Briskmark's offer on 22 October 1996 cannot be compared since the Briskmark's offer was a MBO exercise and that the Briskmark's offer was the only item on the agenda on that day. At pp 525–526 of the NOE she testified as follows:

S: On 22.10.1996, the board was to consider only the offer by Briskmark that is whether the MBO by a Bumiputera Company is viable or not.

J: Yes.

S: The question to compare it with PPB offer does not arise on 22.10.1996 since the Briskmark offer was a MBO.

J: Yes.

S: In any case the Board was aware of PPB's previous offer of 1:5 but on 22.10.1996, there is only one item on the plate.

J: When approving the Briskmark, the PPB offer was not in our mind.

[204] She later admitted that the board would eventually approve the Briskmark offer since the Minister in charge of SLDB PW25, Datuk Joseph Kurup had approved it. At p 526 of the NOE she said this:

Since Minister has approved it, it made little difference to the board, since they would approve it, since Minister has approved it.

[205] Based on PW13, Catherine Yong's evidence, the overriding or prime consideration that moved the SLDB board members to approve the sale of 40% of SAPI shares to Briskmark was the Minister in charge of SLDB, Datuk Joseph Kurup's approval in principle of that sale. The other considerations favourable to Briskmark were the fact that Briskmark was a MBO by a local bumiputera company from Sabah whose management were helmed by PW13, Datuk Wasli the GM and Salim Mohamad the company secretary who as senior management of SLDB has vast experience in the management of palm oil industry. The price offered by Briskmark which is RM9 more than that offered by PPB and the other two local bumiputera companies, Jenuhara and Asam Manis, who according to AA's report was a fair price considering that as a MBO they should be given a 20% discount, also played a role in Briskmark's favour. The fact that PPB's offer at that time was superceded by the offer made by the two local bumiputera companies, Jenuhara and Asam Manis and later the abandonment of the offer by Jenuhara and Asam Manis due to the fact that they had no qualifications to purchase the SAPI shares, resulted, in eliminating all competition and left only the Briskmark's offer to be considered on 22 October 1996. All these factors and the state government's privatisation policy then to encourage local bumiputera participation in the economy clinched the SLDB BOD's approval for the sale of 40% of SAPI shares to Briskmark.

[206] As testified by PW13, Catherine Yong, the accused's conduct in all the meetings was impeccable and beyond reproach. He exercised his role as chairman professionally. He did not indicate his preference or inclination towards Datuk Wasli or Salim Mohamad's Briskmark proposal and neither was he protective towards the two gentlemen. When the two gentlemen declared their interest in the meeting on 22 October 1996, the accused asked them to leave the meeting room before proceeding to discuss the merits of their proposal. Later in their absence when members of the board discussed and querried as to the appropriateness or propriety of the two gentlemen who were then GM and company secretary of SLDB buying the said SAPI shares, the accused did not nor come to their defence but instead said that he would

leave it to the two men to answer the query. When the two gentlemen returned to the meeting room, the accused himself asked PW13 Datuk Wasli on his capacity to buy the said shares.

[207] The accused also, according to PW13, Catherine Yong at no time tried to influence her or any members of the BODs to approved the sale of the SAPI shares to Briskmark.

[208] Therefore from the evidence above the prosecution has not proven that the accused had used his position as chairman to influence the members of the board. What is clear is that the BODs of SLDB made their decision to approve the sale of SAPI shares to Briskmark collectively 'sebulat suara' due to the many favourable factors accompanying the Briskmark proposal, not to mention the Minister's overriding approval and the opportune timing of the proposal which was then in line with the privatisation policy of the state government then.

Evidence that all the SLDB board members and politicians have been bribed by PW30, Datuk Wasli

[209] The defence further contended that since all the BODs of SLDB were bribed by Datuk Wasli there is no inducement on the part of the accused, since through being bribed by Datuk Wasli the board of directors would have approved the sale of the SAPI shares to Briskmark on 22 October 1996.

[210] PW30, Datuk Wasli testified that all members of the BODs of SLDB received RM500,000 from him prior to the meeting on 22 October 1996. He bribed all of them except the chairman (accused) in order to get their support. He met the board members individually in their rooms in Fairlane Hotel. He told them that if Briskmark, the party purchasing the SAPI shares were to make any profits, he will be in a position to donate to the party of their choice.

[211] The prosecution contended that since all members of the board have been bribed except the accused, then it would follow that the accused must, in En Hanafiah's, exact words 'have been getting something and then some, as he sits as the chairman of the decision makers'. It is inconceivable according to En Hanafiah, 'that he was getting nothing, as the evidence shows how easy it was for Briskmark to get the approval of the board to its proposal'.

[212] I find this serious allegation made by the prosecution without merits since the reasoning is flawed and purely based on conjecture and suspicion

alone without any corroborative evidence whatsoever and as such I will not dwell upon it further.

[213] As averred to earlier, Datuk Wasli testified that he had bribed all the BODs of SLDB before they met to discuss his proposal No 27/96 on 22 October 1996. The prosecution had filed three charges against Datuk Wasli for bribing PW23, John Liaw (D309A, D310A, D310B) and also three charges for bribing Michael Emban, another SLDB board director, (D309B, D310C, D310D). In the light of all these charges by the prosecution against Datuk Wasli for offering bribes to PW23, John Liaw and Michael Emban, the second charge of cheating against the accused is perplexing. If the prosecution contended that all the board members were bribed by Datuk Wasli, then their approval on the sale of SAPI shares to Briskmark would be induced by the RM500,000 each of them had been offered by Datuk Wasli. As such where is the inducement on the part of the accused to the board members to vote for SAPI shares to Briskmark. Where then is the element of deception or dishonesty on the part of the accused as required by s 417 of the Penal Code. Deception is only one element of the offence of cheating. There can be no cheating unless by reason of the deception the person deceived (board members) is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception and which commission or omission caused or was likely to cause him some harm or damage in body, mind, reputation or property (refer to *Khoo Kay Jin v Public Prosecutor* [1964] MLJ 22).

[214] Therefore from the above evidence, the prosecution has failed to prove the element of inducement on the part of the accused which inducement led to the board members approving the sale of SAPI shares to Briskmark.

[215] As the prosecution has failed to prove all the elements of cheating on the second charge, it therefore has failed to make out a prima facie case against the accused.

CONCLUSION

[216] On a maximum evaluation of the evidence put forward during the course of the prosecution's case, I find that the prosecution has failed to prove a prima facie case against the accused. This is so as the essential ingredients of both the offences of corrupt practice (first charge) and cheating (second

charge) were not made out on the facts before the court. In the circumstances, the accused stands acquitted and discharged of both the charges against him.

Accused acquitted and discharged.

Reported by Kanesh Sundrum